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chance of becoming a homicide victim is four-and-a-half times higher than for an African-American woman, and sixteen times higher than for a white woman. n18

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n15 See VICTIMIZATION IN 1991, supra note 11, at 6 (finding 40.3 violent crimes against men per 1000 persons, but only 22.9 violent crimes against women per 1000 persons); REPORT TO THE NATION, supra note 9, at 27 (reporting that while men suffer assault at a rate of 32 per 1000 persons, women suffer assault at a rate of only 17 per 1000 persons).

n16 See REPORT TO THE NATION, supra note 9, at 28.

n17 See id.

n18 See id.

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Women's disproportionate victimization is nonetheless a reality, but it is a complex one, rooted not only in raw numbers but in judgments about the vulnerability of female victims and, perhaps, [*2157] an assumption of some contributory fault with regard to many of the victims on the male side: victims who provoked fights, assumed risks, or went looking for trouble. The victimization of women seems disproportionate not simply to women's share of the population but to their desert; the victimization of women seems particularly unfair. The proper complaint, therefore, is not that the victimization statistics lack "objectivity," because observations about women's disproportionate victimization involve an irreducible normative element. That perceptions about women's victimization rest in part on socially constructed value judgments does not, of course, render such perceptions invalid or unimportant.

What the data themselves suggest is that the criminal justice system's preoccupation with male offenders and male victims is not exclusively an artifact of cultural bias in reporting and charging behavior. In part, this preoccupation reflects the nature of the underlying phenomenon of crime in our society and probably most others. Nor would we expect (or want) progress for women to increase women's participation as offenders or as homicide, robbery, and assault victims. n19 So for the foreseeable future, the raw material of criminal justice is likely to remain, to an overwhelming extent, disproportionately male in character.

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n19 On the possibility that women's independence and increased workforce participation might increase women's rates of offending, see infra text accompanying notes 125-29. For a discussion of connections between women's independence and society's stereotypes of women as criminals, see Susan N. Herman, Thelma and Louise and Bonnie and Jean: Images of Women as Criminals, 2 S. CAL. REV. L. & WOMEN'S STUD. 53, 62 (1992); Elizabeth V. Spelman & Martha Minow, Outlaw Women: An Essay on Thelma and Louise, 26 NEW ENG. L. REV. 1281, 1281 (1992).

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Under these circumstances women have, until very recently, remained at the margins of thought about criminal justice problems. The criminal justice system has been run by men, against men, and for the benefit of men. Not so much different from the rest of society, but more so.

The Sections that follow consider some of what needs to be done to correct that imbalance in four areas of special concern to women -- domestic violence, rape, sentencing, and prisons.

[*2158] II. DOMESTIC VIOLENCE

Lack of attention to domestic violence has a venerable tradition in the criminal justice system. Failure to prosecute abusive husbands was not just the result of inattention, because for centuries, the criminal law gave the husband an affirmative privilege to beat his wife in order to provide her with what was seen as appropriate chastisement and instruction. n20 The husband's formal privilege of chastisement was abolished by the end of the nineteenth century, n21 but wife beating continued. The extent of it cannot be measured precisely, but even the cautious studies point to high levels of abuse: 28% of all women experiencing a violent assault at some point in their marriages; 16% of married women assaulted by a spouse in a single year. n22

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n20 See Anne M. Coughlin, Excusing Women, 82 CAL. L. REV. 1, 40-41 (1994) (noting that the husband's right to chastise his wife stemmed from "the belief that married women suffered from a volitional disability"); Joyce E. McConnell, Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment, 4 YALE J.L. & FEMINISM 207, 232 (1992) (noting that "[t]he batterer's belief in a man's right to chastise his partner and to coerce sexual services remains entrenched in the law"). Blackstone attempted to rationalize the husband's privilege of chastisement by connecting it to the marital coercion doctrine, under which a husband could be liable for crimes the wife might commit in his presence (actual or constructive). It was only fitting, Blackstone argued, that the husband have a corresponding privilege of chastisement in order to deter his wife from actions that would expose him to criminal liability. See 1 WILLIAM BLACKSTONE, COMMENTARIES 432 ("For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his servants or children . . . .").

n21 See, e.g., Fulgham v. State, 46 Ala. 143, 143 (1871) (abolishing a husband's right to chastise his wife); The Queen v. Jackson, 1 Q.B. 671, 681-82 (1891) (abolishing the right of marital chastisement in England); see also Bernadette D. Sewell, Note, History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating, 23 SUFFOLK U. L. REV. 983, 984 (1989) (noting that legal authorization of marital chastisement "continued to exist in many Western cultures until the late nineteenth century").

n22 See Frieze & Browne, supra note 12, at 179.

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This culture of spousal abuse coexists with a police practice of not arresting wife beaters, especially in cases perceived as "ordinary" misdemeanor assaults. n23 Many episodes of domestic violence involve life-threatening attacks, assaults with guns, knives, and other weapons, or brutal battering that leaves serious physical injuries. Police are likely to take such cases more seriously than the much [*2159] more numerous domestic disturbances classified as misdemeanors -- those involving loud arguments, slapping, shoving, and kicking. n24 Arrest rates in spousal abuse cases range from a low of only 12% to a high of no more than 50%. n25 Up through the 1970s, police training materials instructed officers to avoid making an arrest whenever possible, n26 and in several states, the majority of police departments had explicit policies against making arrests in domestic assault cases. n27

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n23 See LAWRENCE W. SHERMAN, POLICING DOMESTIC VIOLENCE: EXPERIMENTS AND DILEMMAS 26-27 (1992) (describing patterns of underenforcement of domestic violence laws).

n24 See id. at 26 (noting that police widely ignore domestic violence that involves only slaps and kicks).

n25 See Delbert S. Elliott, Criminal Justice Procedures in Family Violence Crimes, in FAMILY VIOLENCE, supra note 12, at 427, 438.

n26 See ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS 164-65 (1977) (citing the Detroit Police Department's General Orders which imply that domestic violence is not a crime); Elliott, supra note 25, at 435 (noting that "[t]here is little question that the . . . 'hands off' view predominated prior to the early 1970s" and that "[p]olice training materials clearly specified that, when responding to domestic disputes, arrest was to be avoided whenever possible").

n27 See Lawrence W. Sherman & Richard A. Berk, The Minneapolis Domestic Violence Experiment, POLICE FOUND. REP., Apr. 1984, at 7, 8.

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Advocates for battered women brought a number of lawsuits challenging these practices on sex discrimination grounds. n28 There is, however, a problem in trying to attack police practices in this way: arrest rates are very low in all kinds of assault cases, even those involving assailants who are strangers to the victim. n29 Yet the woman who is repeatedly abused by her partner probably needs police protection much more than a man who gets into a fight in a bar. So lawyers working for battered women shifted their focus from one of trying to eliminate sex discrimination to one of trying to eliminate discretion. Mandatory arrest is now the solution favored by many leading advocates for battered women. n30

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n28 See, e.g., Thurman v. City of Torrington, 595 F. Supp. 1521, 1531 (D. Conn. 1984) (denying the defendant's motion to dismiss a Fourteenth Amendment claim that police provided less protection to women abused by spouses or boyfriends than to victims of nondomestic violence); Bruno v. Codd, 396

N.Y.S.2d 974, 979 (Sup. Ct. 1977) (denying a police department's motion for summary judgment on charges of inadequately protecting women from their abusive husbands), rev'd, 407 N.Y.S.2d 165 (App. Div. 1978) (mem.), and aff'd, 393 N.E.2d 976 (N.Y. 1979); see also Joan Zorza, The Criminal Law of Misdemeanor Domestic Violence, 1970-1990, 83 J. CRIM. L. & CRIMINOLOGY 46, 53-60 (1992) (documenting the history of sex discrimination in suits filed against violent husbands).

n29 See Elliott, supra note 25, at 438-41 (examining the similarity between arrest rates for assaults committed against family members and for similar violent crimes perpetuated against strangers).

n30 See, e.g., Clifford Krauss, Keeping in Touch with the Victims of Domestic Violence, N.Y. TIMES, Nov. 21, 1994, at B3 (noting victims' advocates' praise for mandatory arrest policies instituted in New York City).

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[*2160] A. Mandatory Arrest Through the Lens of Feminist Jurisprudence

Domestic violence, a central issue in the struggle to assure dignity and equality for women, is extensively discussed in feminist literature. n31 Yet there has been little effort to consider how battles over theoretical commitments or attempts to refine theoretical paradigms might inform efforts to begin solving this critical problem.

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n31 For references to the recent literature, see SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 829 & n.2 (6th ed. 1995).

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One obvious irony involves the manner in which the tactic favored by many feminist reformers (mandatory arrest) collides with the part of feminist theory that advocates open-textured standards and attention to the nuances of relationships. Feminists inspired by the work of Carol Gilligan n32 reject inflexible rights as a distinctively male conception. n33 Police officers who do not arrest battering husbands are not being very "male" in that sense. They are making ad hoc judgments, based on their intuitions about the whole situation.

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n32 See, e.g., GILLIGAN, supra note 4.

n33 See, e.g., M. Kay Harris, Moving into the New Millennium: Toward a Feminist Vision of Justice, PRISON J., Fall-Winter 1987, at 27, 32 ("[In Gilligan's research] [m]en were more likely to employ a 'rights/justice' orientation [toward moral issues] and women were more likely to reflect a 'care/response' orientation . . . ."); Frances Heidensohn, Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice, 14 INT'L J. SOC. L. 287, 295-96 (1986) (noting that men become "detached, autonomous and individualized" in their quest for justice, while women tend to focus on context and caring).

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This sort of police discretion is presumably not what Gilligan really meant by an ethic of care and connection. Nevertheless, the example highlights a more general point about the supposed clash between a male ethic of rights and a female ethic of context and relationship. There is nothing especially feminist about an ad hoc, discretionary approach to making decisions. It all depends on the values that inform the exercise of the discretion. Nor should we automatically count as "feminist" any ethic that emphasizes caring, connection, and the continuity of relationships. There are situations where that ethic is not only out of place, but dangerous to women. n34 Everything depends on the particular problem, the [*2161] values presupposed, and the kinds of people who will make the judgments. As Kathleen Daly observes:

When court officials define crime and impose sanctions, they use relational reasoning and an ethic of care toward defendants . . . . This female voice may not contain the same relational concerns that women (or feminists) desire, but that is different from saying that men's form of legal reasoning does not contain relational, caretaking, or responsibility concerns. Thus, the problem in criminal-court practices is not that the female voice is absent, but that certain relations are presupposed, maintained, and reproduced. n35

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n34 An "ethic of care" poses related dangers in such criminal justice contexts as the juvenile court movement, civil commitment of the mentally ill, and rehabilitative models of sentencing. See Stephen J. Schulhofer, The Gender Question in Criminal Law, SOC. PHIL. & POL'Y, Spring 1990, at 105, 124. In particular,

the model of caring and connection [is flawed] because . . . conflicting interests are inherent in any criminal justice system that serves society's interests in deterrence and social protection. A system of criminal law premised on caring and connection will simply mask conflict and invite the abuses that vague standards of intervention have produced over and over in ostensibly benign programs.

Id. (citation omitted).

n35 Kathleen Daly, Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice, 17 INT'L J. SOC. L. 1, 2 (1989).

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Scholars associated with what is often called "radical feminism" approach this problem from the opposite direction. They argue that women should have an absolute right to bodily integrity and protection from aggression. n36 Formal equality (a "liberal feminist" stance) is a poor benchmark here because men involved in fights and minor assaults do not have the same need for state protection from one another that women have for protection from assaultive men. Thus, even if the police are equally inattentive to acquaintance assaults when victims are men or women, the state's seemingly even-handed inaction is nonetheless an affirmative policy that contributes to the subordination of women. n37 For feminists committed to this view, society has an obligation to

use arrest powers vigorously when a man violates a woman's right to physical safety. n38 This is a coherent perspective, and surely an appealing [*2162] one, but it takes no account of the psychological, social, and institutional dynamics that determine whether, and under what conditions, a "get tough" approach will really help a particular victim or women in general.

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n36 See, e.g., MACKINNON, supra note 3, at 41 (noting that in domestic relationships, battery of women tends to be ignored, whereas "[w]hen [men] are hit, a person has been assaulted").

n37 See id. at 76 (arguing that when government refuses to prosecute for marital rape, "the woman's obligation to deliver sexually is effectively enforced by the state").

n38 See Kathleen Waits, The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions, in FEMINIST JURISPRUDENCE 188, 202 (Patricia Smith ed., 1993) (arguing that "[a]rrest of the batterer is the central element of an effective police response"); Zorza, supra note 28, at 66 (arguing that in order to deter batterers effectively, more severe sanctions should be imposed).

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B. Evaluating Mandatory Arrest

Good policy for domestic violence cases depends less on the theoretical appeal of either "absolute rights" or "relational reasoning" than on the actual effect of laws and policies that translate these conceptions into operational strategies. In Minneapolis, police conducted an experiment to determine the effect of arrest in misdemeanor assault cases. n39 The result was dramatic support for mandatory arrest: by every measure, arrest was reported to be more effective than other responses such as counseling the parties or sending the suspect away. n40 The results were widely reported and enthusiastically received; numerous police departments adopted rules requiring arrest in domestic assault cases, and more than a dozen states enacted statutes mandating that approach statewide. n41 By 1989, only five years after the study results were released, 84% of urban police agencies reported having mandatory or preferred arrest policies for domestic violence cases. n42

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n39 See Lawrence W. Sherman & Richard A. Berk, The Specific Deterrent Effects of Arrest for Domestic Assault, 49 AM. SOC. REV. 261, 262 (1984) (reporting the results of the Minneapolis study).

n40 See Sherman & Berk, supra note 27, at 7. For an example of early warnings about possible flaws in the Minneapolis study and the need for caution in interpreting its findings, see Elliott, supra note 25, at 453-54.

n41 See Lawrence W. Sherman & Ellen G. Cohn, The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment, 23 L. & SOC'Y REV. 117, 129 (1989) (noting that "[t]he publicity about the Minneapolis experiment did reach a large number of police departments and may have had a substantial . .

. influence on policy"); Zorza, supra note 28, at 64-65 nn.182-86 (citing to the applicable state statutes).

n42 See Lawrence W. Sherman, The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence, 83 J. CRIM. L. & CRIMINOLOGY 1, 23-24 (1992).

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Unfortunately, the rapid and uncritical acceptance of the Minneapolis findings was premature because flaws in the study made it hard to be sure that reported deterrent effects of arrest were not spurious. n43 To afford a more complete picture, experiments [*2163] testing the effects of mandatory arrest were repeated, among broader demographic groups and with better data-collection procedures, in five other cities. n44 In three of them, arrest had a greater deterrent effect than other responses only in the short run; the effect tended to diminish over time, and within a year after the initial intervention, suspects who had been arrested were more likely to engage in repeat violence than those who had merely been warned. n45 A reanalysis of the Minneapolis data revealed a similar pattern in that city. n46 Over time, in other words, arrest often seems to have an "escalation effect," aggravating the subsequent violence.

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n43 Some of the deterrence effects were inferred from official arrest records, but such records cannot reveal whether arrest is deterring subsequent violence or only subsequent reports. The Minneapolis study attempted to control for this problem through follow-up interviews with victims, but there was a large falloff in victim participation in the follow-ups, and the follow-up study was limited to only six months, a period when temporary deterrence effects may dominate to the extent that court proceedings remain possible. See Elliott, supra note 25, at 453 (noting that only 49% of the victims in the Minneapolis study completed all 12 follow-up interviews).

n44 See SHERMAN, supra note 23, at 15-18 (reporting results from similar experiments conducted in Omaha, Charlotte, Milwaukee, Colorado Springs, and Miami).

n45 See id. at 17, 188-87 (describing an initial deterrent effect of arrest, followed by a subsequent escalation in the likelihood of repeat violence in Omaha, Charlotte, and Milwaukee).

n46 In Minneapolis, the deterrent effects of arrest (measured by victim interviews) decayed over time and disappeared after six months. See id. at 197. Although the Minneapolis study did not collect victim interview data after six months, the trend of the data suggests the possibility of an escalation effect after the six-month point. (When repeat violence was measured by official arrest records, arrest had a clear deterrent effect that continued for the entire 18-month period studied. See id. But official records may present a misleading picture of the actual level of battering, if arrest deters victims from reporting subsequent incidents to the police.)

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Advocates for battered women have attacked these more recent studies, especially the "do nothing" strategy they seem to support. As one attorney writes, "We do not consider eliminating arrest for . . . [robbery], [just] because it may not deter a particular . . . class of individuals." n47 Unfortunately, that is a dangerous answer. The objective here is to protect battered women. If arrest is not doing that, we need to consider using other solutions, either in conjunction with arrest or as an alternative to it. Moreover, the danger is not just that arrest may not deter, but that in some situations, arrest may make matters worse. Mandatory arrest may cause more violence to the very women we are trying to help.

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n47 Zorza, supra note 28, at 66.

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Other unintended harms to women have emerged as well. In mandatory arrest jurisdictions, police are sometimes obliged to arrest the abused woman because her partner alleges that she had hit [*2164] him. n48 And there is some indication that visible, highly popular mandatory arrest programs have permitted legislators to reduce their support for more costly solutions like shelters for battered women. n49

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n48 In Connecticut, mandatory arrest policies reportedly led to the arrest of both spouses in 14% of the cases. See Jan Hoffman, When Men Hit Women, N.Y. TIMES, Feb. 16, 1992, (Magazine), at 23, 26. Moreover, if children are present and no other caretaker for them is available, the children may have to be placed in state custody until one of the parents is released. See id.

n49 See SHERMAN, supra note 23, at 255.

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Surprisingly, the tentative Minneapolis study and its recommendations for a more punitive approach received widespread attention and an immediately favorable reception, but public officials and the media have either attacked or ignored the more thorough studies that suggest the opposite conclusion. n50 Theoretical and ideological commitments to punitive strategies and to a rights-oriented response to aggression seem to dominate any concern for designing operational programs which actually help abused women. Yet the best available evidence suggests that an across-the-board policy of mandatory arrest should be anathema to feminists. As Lawrence Sherman writes, using mandatory arrest to fight domestic violence "may make as much sense as fighting fire with gasoline." n51

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n50 See id. at 135-36 (describing political attacks on empirical research and the unwillingness of the Wisconsin legislature to repeal its mandatory arrest statute after the Milwaukee study had indicated the harmful effects of that policy); id. at 266 (describing sparse press coverage of the Milwaukee findings); Sherman & Cohn, supra note 41, at 129 (stating that publicity about

the Minneapolis study reached a large number of police departments and had a substantial influence on policy).

n51 SHERMAN, supra note 23, at 210.

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C. Selective Mandatory Arrest?

An important qualification to this pessimistic assessment of mandatory arrest emerges when data from the follow-up studies are disaggregated. The escalation effect seems especially strong when the batterer is unemployed, but arrest does appear to have a net deterrent effect when the husband has a job or other marks of social stability. n52 That finding triggers a further series of dilemmas. Should we arrest only the employed? If not, should we arrest in all cases, knowing that this will harm some women? A third possibility is to leave the decision to each officer on the spot. That would probably give us the worst of both worlds: police would arrest blacks and the underclass while letting off middle-class white [*2165] offenders with a warning. n53 In practice we would get warnings when arrest might really help and arrest when it is most likely to be counterproductive.

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n52 See id. at 155.

n53 See, e.g., Caroline Forell, Stopping the Violence: Mandatory Arrest and Police Tort Liability for Failure to Assist Battered Women, 6 BERKELEY WOMEN'S L.J. 215, 221 (1991) (summarizing results of a Duluth study in which minority males comprised 8.5% of those arrested under a policy of mandatory arrest, but comprised 33% of arrestees when the decision to arrest was left to police officers' discretion).

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A final possibility is to leave the choice up to the victim. n54 This seems a promising option, but it too conceals dilemmas and risks. Victims know the offender better than the police do and may be able to predict whether his arrest will be an effective deterrent. Deference to the victim's wishes also may strengthen her self-esteem and empower her within the relationship. Yet there are important countervailing concerns. Few victims will be aware of the long-run escalation effects of arrest or of the complex roots of that phenomenon. Moreover, the victim will have to make her decision at a moment of great stress with little relevant information and little time for reflection. n55 Even if the police talk privately to the victim in a separate room, the offender may perceive that her preferences control the arrest decision, and if so, the escalation effects of arrest could be aggravated. Deference to the victim could backfire in another way if victims who fear retaliation are deterred from expressing their preference for arrest.

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n54 See, e.g., David A. Ford, Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships, 25 L. & SOC'Y REV. 313, 330 (1991) (evaluating deference to victim preferences in deciding whether to

arrest and prosecute batterers).

n55 To make matters worse, a significant number of domestic violence victims (21% in one city studied) are intoxicated at the time police arrive on the scene. See SHERMAN, supra note 23, at 207.

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The effects of deferring to the victim's preferences are worth studying carefully, but there is little reason to hope that such a policy will offer a panacea for the dilemmas we have been considering. In any case, to underscore the obvious, theoretical conceptions of domination and related commitments to "empowering the victim" n56 provide little practical guidance to those who want to find a way to help women caught in abusive relationships. The value of deference to victim preferences turns on the specific methods used to make that policy operational and on the complex, multidirectional effects that those methods will have in practice.

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n56 See Ford, supra note 54, at 317-20 (discussing empowerment theories).

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[*2166] D. Getting Tougher: Giving Content to "Arrest"

Instead of seeking to minimize arrest, especially for unemployed husbands, a more promising approach might be to consider more severe sanctions for all categories of offenders. Indeed, mandatory arrest may appear ineffective or dangerous in part because the response being advocated ("arrest") is mainly a slogan, not a fully specified policy. In many cities, suspects arrested on domestic violence charges are free within a few hours; among the six cities in which mandatory arrest experiments were conducted, average times in custody varied from twenty-four hours to only two. n57

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n57 See SHERMAN, supra note 23, at 140-42. Longer times in custody did not correlate cleanly with either the deterrence effects or the escalation effects, perhaps because times were poorly measured, and other factors that affect the severity of the arrest experience (jail conditions, for example) were not measured at all. See id.

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The constitutional right to bail n58 accounts for some of the rapid release times and may make that feature of the current landscape difficult to change. Nonetheless, rapid release times probably are not a major cause of the ineffectiveness of mandatory arrest, because most of the experiments show some deterrence over the short run, even when suspects spent very little time in jail. n59 The problem is that the deterrence effect of arrest tends to dissipate, and escalation effects begin to dominate, roughly six months after the arrest. n60 The decay of deterrence effects could be slowed by making the initial arrest a more unpleasant experience, but that approach obviously risks making the escalation effects more severe as well.

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n58 See U.S. CONST. amend. VIII.

n59 See SHERMAN, supra note 23, at 129, 141.

n60 See id. at 189.

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There is another reason why mandatory arrest is primarily a slogan, not a concrete policy. To advocate "arrest" says nothing about what should happen after the arrestee's inevitable release on recognizance or money bail. Husbands arrested for misdemeanor assault are almost never prosecuted. n61 An obvious option is to combine the increased use of arrest with a greater determination to get convictions and jail time. But the available data permit little confidence that prosecution provides the easy answer. In Milwaukee and Charlotte, two cities in which mandatory arrest appeared to produce an escalation effect, the percentage of suspects prosecuted [*2167] and convicted was only 1% and 28% respectively. n62 But substantial escalation effects also occurred in Omaha, a city where 64% of the arrestees were prosecuted and convicted. n63

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n61 See Sherman, supra note 42, at 29 (reporting that in Minneapolis, only 4% of those arrested were ever convicted, and in Milwaukee, only 1% were ever convicted).

n62 See SHERMAN, supra note 23, at 141-42.

n63 See id.; Franklyn W. Dunford et al., The Role of Arrest in Domestic Assault: The Omaha Police Experiment, 28 CRIMINOLOGY 183, 193 (1990).

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Normatively, as well, the increased-prosecution approach poses uncomfortable choices. Since employed offenders seem to be deterred by arrest alone, n64 do we reserve prosecution and jail time for the unemployed? That's not easy to live with. Or do we jail all the offenders? If so, the men who had jobs often will lose them, and middle-class wives who have sought help in the past may now be afraid to call the police. And no matter which way we resolve these issues, we still cannot be sure that a more punitive approach will have a net deterrent effect overall. For the chronic, seriously violent batterer, vigorous prosecution and substantial prison time are usually appropriate. But unless we are willing to treat every episode of domestic assault as a felony deserving a year or more in prison, the deterrent and incapacitative effects of punishment, in cases not involving a weapon or serious bodily injury, are inherently limited.

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n64 See supra text accompanying note 52.

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E. Other Alternatives

Because mandatory arrest and other punitive responses have such problematic effects, other options need to be explored. Yet the array of promising alternatives is meager.

One seemingly constructive approach is for the officer on the scene to refer the abuser to counseling services, possibly with the added inducement of a court order or a threat to arrest after any repeat episode. Unfortunately, evaluations of this option are just as pessimistic as those concerning the use of arrest. There is as yet no evidence that counseling reduces the offender's propensity for repeat violence. n65 What is worse, because women are more likely to remain with an abuser who is in counseling, the likelihood of further victimization actually increases when the counseling option is used. n66 Thus, counseling, like mandatory arrest, actually seems [*2168] associated with an escalation effect. Such findings obviously do not mean that counseling cannot be helpful. Outcomes may depend on the structure and quality of the counseling programs, the kinds of offenders who participate in them, the degree to which participation is coerced, and so on. Well-conceived programs certainly deserve to be funded, tried, and tested, but until that can be done, the counseling option needs to be viewed with caution.

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n65 See SHERMAN, supra note 23, at 249 (noting that "no randomized experiment yet demonstrat[es] that court-ordered counseling can reduce the frequency or prevalence of repeat domestic violence"); Zorza, supra note 28, at 67 (noting that "completing batterer treatment made no difference in stopping future violence").

n66 See Zorza, supra note 28, at 67 (suggesting that victims may be "deceived" into reconciling with abusers in counseling because the victims may think that counseling will produce an end to the violent behavior).

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Orders of protection can backfire in a similar way. As a popular component of domestic violence reform legislation, orders of protection have proved notoriously ineffective, largely because statutory mandates and newly created rights have not been accompanied by commensurate efforts to provide necessary resources or to educate police, court officials, and victims in the proper use of new procedures. n67 As a result, such orders may serve only to foster misplaced confidence that ultimately leaves victims at greater risk. n68 Except in the case of the most determined aggressors, orders of protection probably can contribute to the protection of abused women, provided they are backed by thorough training and better resources. In the absence of substantial and sustained institutional support, however, they risk causing more harm than good.

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n67 A study by the National Institute of Justice found that police often fail to inform victims of available remedies, fail to serve the orders of protection on the abuser (thus nullifying their effect), and fail to arrest when orders

of protection are violated. See Peter Finn, Civil Protection Orders: A Flawed Opportunity for Intervention, in WOMAN BATTERING: POLICY RESPONSES 155, 182 (Michael Steinman ed., 1991).

n68 See Janice Grau et al., Restraining Orders for Battered Women: Issues of Access and Efficacy, WOMEN & POL., Fall 1984, at 13, 27 (calling for improvement of the procedures for obtaining, and enforcing, restraining orders).

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Another important approach is to expand the availability of shelters for battered women, so that victims can more easily leave abusive relationships. Police called to the scene of a domestic assault could be required to explain that option and to offer to transport the victim directly to a shelter if she wishes. Lawrence Sherman suggests this approach as a possible way for police to protect the victim against both the long-run escalation effects of arresting the abuser and the short-run dangers of leaving the scene without arresting him. n69

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n69 See SHERMAN, supra note 23, at 208-10.

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Theoretical commitments and intuitions of fairness prompt resistance to this approach, however. Why should the victim be the [*2169] one who has to leave her home? Why not require the abuser to leave? Of course, the victim still can reject the offer; she could not be required to leave. But when a police officer refuses to arrest the abuser and encourages the victim to accept transportation to a shelter, we can hardly view state policy as simply facilitating the exercise of a wholly "voluntary" choice.

The Minneapolis experiment tested the option of requiring the abuser to leave the premises (ostensibly for eight hours) without arresting him. n70 In reality, however, the abuser was free to return as soon as the police left. Only arrest or an order of protection will keep the abuser out of the home, but these responses can be ineffective and dangerous, as we have seen. In any case, the Minneapolis experiment showed that requiring the abuser merely to leave produced high rates of repeat violence. n71 Against that background, the fact that the victim has a right to remain on the premises, while the abuser has none, can be dispositive only as a matter of pure theory. When a terrorist is spraying the street with bullets, those of us who have the right to remain on the sidewalk may prefer not to stand our ground. In an imperfect world, discretion may be the better part of valor. And the world of efforts to control domestic violence is hedged by imperfections at every turn.

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n70 See Sherman & Berk, supra note 27, at 7, 9.

n71 See id. at 7, 12.

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F. Developing Effective Responses

The preceding considerations suggest that sharply etched, theoretically satisfying positions are unlikely to carry us very far toward effective solutions to the problem of domestic violence. Helpful responses are more likely to be complex, eclectic, costly, and elusive.

Several components of a constructive policy nonetheless can be identified. First, complex and contingent response strategies must not obscure the message that spousal abuse is a crime and that it will not be tolerated. Every police response must be structured to send the offender a clear warning that domestic violence is unacceptable and that future incidents will be met with increasingly punitive responses. Similarly, to combat any police tendency to take domestic violence cases cavalierly, officers need guidelines that require an energetic response. Mandatory arrest serves that function but only [*2170] at some risk to the women we are trying to help. A more useful rule of thumb, therefore, would not insist on arrest per se, but mandatory action -- action of some sort, from a list of strong, constructive alternatives, n72 and a mandatory report (normally in writing), both to ensure a thoughtful response and to inform officers who might be called to the same address in the future.

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n72 See SHERMAN, supra note 23, at 253-56 (listing options including transporting the victim to a shelter, taking the suspect or victim to a detoxification treatment center, and allowing the victim to decide if an immediate arrest should be made).

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Specific response options will necessarily reflect the services and programs (including prosecution programs) available in the particular jurisdiction; over the longer run, effort should focus on strengthening and evaluating alternative approaches. For chronic offenders and cases involving serious injuries, a vigorous prosecution program should assure substantial jail or prison terms. In the most minor cases, a stern warning or a reference to counseling may be appropriate, especially if records are adequate to assure that there have been no prior episodes of violence involving the same couple. For cases falling in between these extremes, arrest or some other means of separating the parties should be considered, with choices depending on the woman's desire to preserve the relationship, the history of past abuse, and other relevant circumstances. Where resources and back-up procedures permit, it may be appropriate to require the husband to leave and stay away long enough for the wife to obtain an effective order of protection. But if that avenue seems unlikely to afford real safety for the woman, an offer to transport her to a shelter may be appropriate, if that is the course she prefers.

The spousal-abuse problem illustrates two general points that apply to criminal justice and to probably most other areas of the legal system. First, legal, social, and institutional details are critical. Second, quick-fix statutes and doctrinal change do very little, and may even backfire, unless they are backed by changes in attitudes, personnel, and resources.

III. RAPE

I have just suggested that rigid rules will not work well in domestic violence cases. There, we need to rely on flexible standards. For rape statutes, I reach the opposite conclusion.

[*2171] At one time, the law of rape openly denied equality to women, for example, in rules that required special corroboration for rape complaints. n73 Formal inequalities have largely disappeared, but the problems have not. Most of the problems stem from the highly contextual way that the formally equal doctrines of rape law are applied in practice. As in the case of arrests for domestic violence, the law is quite preoccupied with the nuances of the relationship between the alleged offender and the victim. What is missing is not a jurisprudence of context. What is missing is sufficient respect for what should be clear-cut rights.

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n73 See, e.g., United States v. Wiley, 492 F.2d 547, 550-51 (D.C. Cir. 1973) (establishing that a person may not be convicted of a "sex offense" unless the testimony of the victim is corroborated by, for example, medical evidence); see also Note, The Rape Corroboration Requirement: Repeal Not Reform, 81 YALE L.J. 1365, 1366-72 (1972) (recounting the history and status of the corroboration requirement). Wiley was overruled by United States v. Sheppard, 569 F.2d 114, 117 (D.C. Cir. 1977) (holding that corroboration of the victim's testimony is no longer a requirement for conviction in a sex offense case). Nearly all American jurisdictions have abandoned special corroboration rules applicable only to rape complaints. See KADISH & SCHULHOFER, supra note 31, at 371 (noting that no American state now requires corroboration in forcible rape cases).

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Because the current feminist critiques are by now familiar, I will sketch the problems and the prevalent criticisms rather quickly. Then I will suggest a perspective that is a bit different from the ones most often discussed.

A. The Prevailing Law of Rape

The controversies are framed by a definition of rape that has been with us since the time of Blackstone -- intercourse by force and without consent. n74 There have been two important waves of statutory reforms, the Model Penal Code revision in the 1950s and revisions inspired by feminist reformers in the 1970s. n75 New statutes relaxed the rules of evidence and tinkered with the definitions of force and consent. But all of the statutes accepted the basic framework, which still requires both force and nonconsent. n76

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n74 See 4 WILLIAM BLACKSTONE, COMMENTARIES 210 (defining rape as "carnal knowledge of a woman forcibly and against her will").

n75 For a discussion of the background and specific elements of the reforms of the 1950s and the 1970s, see Stephen J. Schulhofer, Taking Sexual Autonomy Seriously: Rape Law and Beyond, 11 L. & PHIL. 35, 36-40 (1992).

n76 See id. at 38-39.

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[*2172] The reforms of the 1970s made convictions somewhat easier, but important kinds of abuse still are not covered by statutory language. Two examples from recent cases will serve to illustrate my points.

1. The defendant meets the victim in a singles bar, and she gives him a ride home. When they get there, she turns down his invitation to come inside, but he is not about to take "no" for an answer. He takes her car keys from the ignition and pleads with her to come in for a few minutes. It is 1:00 a.m., in an unfamiliar neighborhood, and she is frightened, so she goes with him under protest. In his room, he presses her for sex. She keeps saying "no" and starts to cry, but she eventually submits so that he will let her leave. n77

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n77 See State v. Rusk, 424 A.2d 720 (Md. 1981).

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The appellate court said it would uphold the rape conviction in this case, but only because there was evidence that the defendant had threatened the victim with direct physical harm. n78 Why should that detail be critical to the result?

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n78 See id. at 728.

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2. The defendant and the victim live together for several months. He often beats her to make her meet his sexual demands. Eventually, she moves out, but one day they meet again and go to a friend's house to talk. The defendant bluntly announces that he wants sex, but she refuses. He orders her to lie down on a bed. She freezes in fear, while he undresses her and penetrates her. n79

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n79 See State v. Alston, 312 S.E.2d 470 (N.C. 1984).

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Should that kind of behavior be sufficient to make out a case of rape? The North Carolina Supreme Court said the evidence of nonconsent was overwhelming. But it also said there was no proof that the defendant had used force. So it reversed the conviction. n80

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n80 See id. at 475-76.

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These are situations where the defendant's behavior is egregiously wrong, by any standard of common decency. But existing conceptions of force and

nonconsent are not clear enough to make the conduct illegal.

B. Strategies for Reform

Most reformers responding to problems such as those described above make essentially two points: 1) "no" means no, n81 and 2) force should extend from explicit to implicit threats, from [*2173] violence to implicit power. n82 These points are plausible, and they are certainly widely accepted. But on close inspection, these solutions turn out to be misdirected.

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n81 See, e.g., ESTRICH, supra note 7, at 102 (maintaining that the law should define "consent" in such a way that "no" means no).

n82 See, e.g., Susan Estrich, Rape, 95 YALE L.J. 1087, 1115 (1986) (arguing that courts should "understand force as the power one need not use (at least physically)").

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1. "No" Means No

It is hard to see why the claim that "no" means no should be considered a revolutionary idea, but many people are still hotly debating it. In a recent article, Professors Husak and Thomas marshalled social science surveys in which many women say that, for them, "no" does not mean no. n83 The authors conclude that contemporary American culture does not give a verbal "no" the meaning of unequivocal nonconsent that I and others have attributed to it. They write that "Schulhofer's proposal [to treat a verbal "no" as sufficient to establish nonconsent] is not without cost to women [because] it distorts rather than accurately represents [existing social] convention[s] . . . ." n84

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n83 See Douglas N. Husak & George C. Thomas III, Date Rape, Social Convention, and Reasonable Mistakes, 11 L. & PHIL. 95, 122 (1992). In a recent survey of Texas female undergraduates, 39.3% reported that they had said "no" when they meant yes, and 60.8% of the sexually experienced women in the survey said that they had done so. See Charlene L. Muehlenhard & Lisa C. Hollabaugh, Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988). The authors are quick to point out that this pattern of communication, although rational for some women, can teach men to disregard women's refusals and thereby increase the incidence of rape. See id. at 878.

n84 Husak & Thomas, supra note 83, at 113.

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These objections to treating "no" as unequivocal evidence of nonconsent reflect conceptual, as well as political, disagreement. "No" means no is in part a cultural claim and an advocacy slogan; as such it invites skeptics to question what "no" really does mean. The usual feminist response to such skeptics has been to reassert forcefully that "no" does mean no and that any

non-Neanderthal male should agree. n85 It is not surprising that feminists would be reluctant to concede that "no" might ever mean yes (apart from cases of abject false consciousness). Yet much of this debate results from misunderstanding the significance of empirical data for what is ultimately not an empirical issue. For law, the relevant question [*2174] is the effect that should be attributed to a woman's use of the word "no."

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n85 See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 175 (1989) ("If rape laws existed to enforce women's control over access to their sexuality, . . . no would mean no . . . .").

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Although not decisive, the empirical landscape is obviously relevant here, because in an inquiry about what people mean when they speak, no one would want to give a word a meaning for legal purposes that is utterly at odds with ordinary usage. But the matter becomes a legal issue precisely because the usage of the word is not uniform throughout the culture. It can hardly be fatal to the feminist position, therefore, to discover that women who say "no" do not always mean the same thing. Because they do not, mistakes are possible. And so long as neither law nor culture develops rules to permit uniform appraisal of such mistakes, some of them can plausibly be described (although this will pain many feminists) as reasonable. The proposition that, for legal purposes, "no" means no is, therefore, primarily a normative claim about how the word should be understood in the face of ambiguity about its actual meaning in any given context.

The objection that taking "no" to mean no will make it "harder for some women to get what they want" n86 therefore misses the point of such a proposal. As with any default rule, the legal proposition that "no" means no does not claim infallible accuracy; to the contrary, the absence of empirical consensus is its raison d'etre. It presupposes ambiguity and seeks to allocate the risk of the inevitable misunderstandings.

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n86 Husak & Thomas, supra note 83, at 114.

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As a normative claim, the proposition that "no" should be taken to mean no is not subject to any plausible objection. True, as Husak and Thomas note, this "proposal designed to make it more difficult for men to get away with rape might have the . . . effect of making it harder for some women to get what they want." n87 But this cost, inevitable for any default rule, is in no way comparable to the costs that are incurred by the traditional approach that Husak and Thomas, among others, prefer. That approach makes it harder for other women to get what they want, in this case women who have sought to avoid male sexual impositions by expressing their desires in plain language. There can be little doubt about which set of frustrated expectations is more serious or more deserving of legal protection.

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n87 Id.

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[*2175] Although the "no"-means-no claim should not be controversial, the more serious difficulty is that this proposition offers surprisingly little help. In real cases, the "no" is often followed by some form of equivocal acquiescence, or even a "yes." How should the "no"-means-no rule apply in cases like that?

One approach suggested is to use something like the Miranda rule. In police interrogation, a consent to talk about a crime is considered involuntary if an initial "no" is followed by any questions or comments that persuade the person to talk. n88 The argument is that a similar approach should apply in rape cases: a woman's consent would be invalid if her "no" was followed by cajolery or psychological ploys that led her to acquiesce. n89

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n88 See Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

n89 See ESTRICH, supra note 7, at 40-41 (contrasting the rule that "no" is insufficient to establish nonconsent in rape to the rule in custodial questioning that "a suspect's 'no' must mean no, and questioning must cease").

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That approach sounds plausible until you try to apply it to situations involving dates or acquaintances. Suppose a woman says "no" to her lover before dinner and then changes her mind after several hours of intimate conversation? Would the consent have to be considered invalid? That cannot be the right result. The only way to sort out these problems is to focus on the conduct that leads to a "yes" -- in other words, whether the persuasions are improper. "No" means no just does not help sort out whether the things that happen after the "no" are legitimate or abusive. And even if the "no" is clear and persistent, the "no"-means-no rule is still insufficient because it only serves to establish nonconsent, and under existing law nonconsent is insufficient to establish rape: the prosecution must prove "force" in addition. n90

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n90 See supra text accompanying note 76.

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2. The Meaning of "Force"

The other strand in current reform proposals is to tackle the problem by expanding the conception of force. Many rape reformers stress that force can take the form of strength that a man does not need to use. n91 Force can involve not only physical violence but also other kinds of power. n92 This approach reflects the theories of male dominance developed by Catharine MacKinnon n93 [*2176] that are now supported by many moderate feminists n94 and by several

courts. n95

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n91 See Estrich, supra note 82, at 1115.

n92 See id. (noting that existing law "create[s] a gulf between power and force").

n93 See MACKINNON, supra note 3, at 40 (arguing that "[g]ender is . . . a question of power, specifically of male supremacy and female subordination").

n94 See, e.g., ESTRICH, supra note 7, at 63 (arguing that one of the problems with "'force' as a standard is . . . that it is too narrowly defined").

n95 See, e.g., State ex rel. M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (stating that the requirement of "physical force" is satisfied any time the defendant penetrates a woman against her will); State v. Etheridge, 352 S.E.2d 673, 680 (N.C. 1987) (holding that "force" may be "actual, physical force or . . . constructive force in the form of fear, fright, or coercion").

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Some women worry that the dominance approach, which is intended to strengthen women, may wind up making them feel weak and more vulnerable. n96 The cultural effect of these debates is tricky, but it is not really decisive for the criminal law. The sexual pressure on women is real; the law cannot wish that away or wait until all men "get it."

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n96 See, e.g., Vivian Berger, Not So Simple Rape, CRIM. JUST. ETHICS, Winter-Spring 1988, at 69, 75 (reviewing ESTRICH, supra note 7) (arguing that Estrich's approach may lead the law to "patronize" women). A related theme is sounded and expanded in a number of recent revisionist attacks on the feminist program. See, e.g., KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS 163 (1993) (arguing that teaching women to "recognize" behavior as sexual harassment may train them to think like victims).

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The more important concern for law is that recognizing the power of male sexual pressure does not solve the legal problem because, as usual, a major part of the legal problem is a boundary ("line-drawing") problem. Despite the undoubted value of legal analysis or cultural criticism that points to commonalities between physical violence and social, economic, or psychological pressure, n97 the job of legal scholarship is not finished until a workable boundary between permitted and regulated conduct has been identified. n98 And in the case of rape, the boundary problem is acute. If [*2177] disparities in economic and social power are sufficient to establish coercion, then force is pervasive in human affairs. If disparity of size, strength, and fighting ability are sufficient to establish force, rape is implicit in nearly every heterosexual relationship.

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n97 See, e.g., Commonwealth v. Mlinarich, 498 A.2d 395, 416 (Pa. Super. Ct. 1985) (Spaeth, J., dissenting) (arguing that "forcible compulsion" includes nonphysical compulsion); see also Lucy R. Harris, Comment, Towards a Consent Standard in the Law of Rape, 43 U. CHI. L. REV. 613, 643-45 (1976) (arguing for the criminalization of sexual coercion via threat of nonphysical harm).

n98 Cf. Robin L. West, Legitimating the Illegitimate: A Comment on Beyond Rape, 93 COLUM. L. REV. 1442 (1993). Professor West's article criticizes a male scholar's proposal to draw lines between permissible and impermissible sexual pressures, and suggests that the very effort to mark such a boundary and to condone conduct on one side of the line is in itself inappropriate. See id. at 1452-59. The article is filled with interesting and insightful cultural criticism, but its implication that such line-drawing efforts are inappropriate in principle seems unfair not only to the author of the proposal, but to the women who are seeking helpful responses to inadequacies in the law of rape.

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The move to expand the conception of force thus has much truth to it but no stopping point. In that sense, it is too radical. That is a common reaction to Professor MacKinnon's approach. n99 But the dominance approach is also too conservative because it remains linked to notions of force. In actual administration, it is almost certain to be held back by the cultural preconceptions that determine what force means to the many police, prosecutors, judges, and jurors who are not feminists. Efforts to expand accepted conceptions of force can offer interest and excitement to conversations within feminist circles, but as these approaches rest upon accordion-like notions of power or pressure, they inevitably lead the discussion into an area where boundaries will be unclear and social consensus will be elusive.

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n99 See, e.g., Berger, supra note 96, at 75 (arguing that "[t]o treat as victims in a legal sense all of the female victims of life is at some point to cheapen, not celebrate the rights to self-determination [and] sexual autonomy . . . of women").

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We all face pressures and constraints on our choices every day. The pressing problem for feminist jurisprudence and legal reform is to provide tools for determining which pressures are excessive or improper. A "dominance" analysis offers little guidance here, unless we want to treat conduct as rape whenever the pressures deployed are deemed "excessive," "unreasonable," or "unfair." A recent Pennsylvania decision takes essentially that view in equating the "forcible compulsion" required for rape with "using superior force -- physical, moral, psychological or intellectual -- to compel a person to do a thing against that person's volition." n100 But even if we by-pass the obvious vagueness problems entailed in deploying such a standard against economic inducements, emotional pressure, and the like, this approach will not necessarily work well for the women we want to protect, because there is no guarantee that prosecutors and juries will accept a feminist perspective on when such pressures are improper.

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n100 Commonwealth v. Rhodes, 510 A.2d 1217, 1225 (Pa. 1986); see also Mlinarich, 498 A.2d at 404 (Spaeth, J., dissenting) (defining "forcible compulsion" to mean to constrain or compel "by physical, moral, or intellectual means or by the exigencies of the circumstances"); cf. MODEL PENAL CODE @ 213.1(2)(a) (1980) (punishing conduct as "gross sexual imposition" if it produces submission to intercourse by "any threat that would prevent resistance by a woman of ordinary resolution").

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[*2178] Three recent proposals attempt to draw more specific lines. Professor Donald Dripps argues that physical violence should not be the only factor sufficient to render sexual intercourse criminal, and he proposes a crime of "sexual expropriation" to punish certain nonviolent impositions as an offense distinct from rape. n101 His analysis rests on a "commodity theory" that sees "sexual cooperation as a service much like any other," in which "erotic assets" are exchanged for monetary or nonmonetary compensation. n102

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n101 See Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780, 1799-1805 (1992).

n102 Id. at 1786.

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This concededly "unromantic notion of sex" n103 provides a poor basis for understanding the dynamics of personal relationships, and it tends to entrench and endorse much of the sexual pressure that women so often experience as problematic. Although Dripps seems to acknowledge that "some nonviolent pressures should be criminal," n104 the only nonviolent impositions actually covered by his proposal are cases in which the woman is unconscious or mentally incompetent, or in which she has expressly refused consent. n105 The Dripps proposal would thus impose no criminal sanctions in cases of silence or ambivalence about consent, nor would it punish cases of express acquiescence produced by nonviolent pressure, however serious. In a recent Montana case, a high school principal allegedly got a student's consent to sex by threatening to prevent her from graduating. n106 The court held that its sexual assault statute required a threat of physical harm and that the principal's alleged conduct therefore was not criminal. n107 Professor Dripps evidently would agree with the result, not only as a matter of statutory interpretation but as a matter of policy. Indeed, he concludes by "argu[ing] for limiting the reach of criminal liability to cases in which the defendant either causes sex through violence or engages in sex over the victim's expressed refusal." n108

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n103 Id.

n104 Id. at 1800.

n105 See id. at 1807 (including these conditions in a model sex offense statute).

n106 See State v. Thompson, 792 P.2d 1103 (Mont. 1990).

n107 See id. at 1106-07.

n108 Donald A. Dripps, More on Distinguishing Sex, Sexual Expropriation, and Sexual Assault: A Reply to Professor West, 93 COLUM. L. REV. 1460, 1463 (1993) (emphasis added).

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Professor Susan Estrich suggests a different approach. She, like Dripps, would treat an expressed refusal (but not silence or ambivalence) as sufficient to establish nonconsent. She goes further [*2179] than Dripps in two respects. She argues that "[t]he 'force' or 'coercion' that negates consent ought to be defined to include extortionate threats and misrepresentations of material fact." n109 And she concludes that such conduct should be called "rape," not some other offense. n110 This seems a sensible way to begin thinking about factors that taint consent. But Estrich unfortunately does not spell out her notion of either extortion or misrepresentation. Because her concept of rape could extend even to a partner who insincerely professes true love for his or her date, many committed feminists are dubious about Estrich's analysis. n111 Without further detail, the approach seems either plausible but vague, or clear but far too broad.

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n109 ESTRICH, supra note 7, at 102-03.

n110 See id. at 103 ("The crime I have described may be a lesser offense . . . but it is a serious offense that should be called 'rape.'").

n111 See, e.g., Berger, supra note 96, at 75 (arguing that Estrich's broad conception of force "may backfire and ultimately damage the cause of women"); Lynne N. Henderson, What Makes Rape a Crime?, 3 BERKELEY WOMEN'S L.J. 193, 228 (1988) (reviewing ESTRICH, supra note 7) (criticizing Estrich for "poorly . . . thought out" proposals that "suffer from the same flaws and difficulties as current laws"). For a discussion of whether deception should invalidate consent, see Schulhofer, supra note 75, at 88-93.

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The New Jersey Supreme Court's recent, much-discussed decision in State ex rel. M.T.S. n112 adopts a third solution. The case dealt with the interpretation of a statute punishing conduct as "sexual assault" when intercourse is committed by "physical force or coercion." n113 The court held that this requirement is met by the force inherent in the act of intercourse itself, whenever the act is nonconsensual. n114

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n112 609 A.2d 1266 (N.J. 1992).

n113 N.J. STAT. ANN. @ 2C:14-2c(1) (West 1982).

n114 See M.T.S., 609 A.2d at 1276-77.

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This approach succeeds in criminalizing nonviolent sexual misconduct but with several costs. The statute prohibiting "force or coercion," without any mention of nonconsent, is in effect rewritten to prohibit nonconsensual intercourse without regard to force (other than that intrinsic to intercourse). Under this view criminality turns on the validity of consent; the court specified that consent must be "freely-given" n115 but provided no standard for making this determination, beyond its rejection of physical violence as a touchstone. Thus, for cases where there is express acquiescence, induced by problematic means, the seemingly specific New [*2180] Jersey approach ultimately draws no line at all. And the court placed such misconduct in the same statutory grading category as physically violent rape, an offense that is punishable in New Jersey by a minimum of five years in prison. n116

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n115 Id. at 1277.

n116 Because M.T.S. was a juvenile case, the trial court was able to grant the defendant a suspended sentence. See id. at 1269. In an adult prosecution, New Jersey law would not permit suspension of the minimum five-year term except under "'truly extraordinary and unanticipated circumstances.'" State v. Johnson, 570 A.2d 395, 398 (N.J. 1990) (citation omitted).

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Dominance is not the way to get at this problem. The underlying concern here is to protect a woman's autonomy in matters of sexual choice. The autonomy concern needs to be addressed directly, not as a by-product of definitional debates about force.

3. Protecting Autonomy

Autonomy is not self-defining, of course. Stating the problem as an autonomy question amounts to a nonsolution if violations of autonomy are equated with coercion by excessive pressure.

An alternative approach is to define autonomy as the right to protection from those interferences that our culture and our legal system already consider impermissible. n117 This seemingly minimalist approach to the problem has unexpected power in serving to identify sexual behavior that is unambiguously improper.

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n117 See Schulhofer, supra note 75, at 69-71 (developing a theory of sexual autonomy based on existing conceptions of impermissible interference with bodily integrity and freedom of choice).

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It is important to stress that in advocating reliance on this very "thin" conception of autonomy, I do not imply moral approval for all conduct outside its reach. Many troubling forms of sexual pressure manage to avoid use of threats that are prohibited by existing principles within our culture. Economic pressure, for example, can have powerfully constraining effects on freedom of action, and decisions to accept sexual intimacy for economic reasons are appropriately regarded as "unfortunate, unattractive, or degrading." n118 That such pressures will not always violate the minimalist conception of autonomy I develop here is not a reason to insulate them from moral or psychological criticism or from the eventual adoption of more ambitious legal standards. The conception of autonomy I want to spotlight is not intended as the end of dialogue or legal development. Rather, it simply offers a baseline that is relatively uncontroversial in its moral and cultural presuppositions. [*2181] Yet this minimalist starting point has significant power to extend the scope of available legal protections.

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n118 Id. at 86.

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Several examples will illustrate the far-reaching implications of the conception of autonomy that is already broadly accepted within our culture. First, when is consent lacking? "No" means no, obviously. But an intrusion on the person requires more than just the absence of a clear "no." A physical intrusion on the person requires actual permission.

Would anyone think that a medical patient's ambivalence, or an ambiguous "maybe," was a consent to medical treatment or surgery? Obviously, anything less than clear affirmative permission would never count as consent. Imagine Atlas, an Olympic weightlifter, consulting a doctor about whether to have surgery on his elbow. The doctor really wants to perform the operation. He thinks Atlas will be very happy with the experience. But the weightlifter is uncertain. He thinks things may not work out the way the doctor has promised. And there is a risk of picking up a serious infection. So Atlas hesitates, says he just is not sure. Can the doctor just go ahead and start cutting? Would we ever treat the weightlifter's silence or indecision as equivalent to consent? No, obviously, but why not? No one compelled him to submit. If he really objected, all he had to do was say so! Yet we would never consider silence or ambivalence as equivalent to consent for surgery. To say that is not to patronize Atlas; it is simply to recognize an obvious violation of the physical autonomy of his person.

Why should the physical autonomy of a woman's body not be entitled to the same respect in a sexual encounter? Clear proof of an unequivocal "no" should not be required. Consent for an intimate physical intrusion into the body should mean in sexual interactions what it means in every other context -- affirmative permission clearly signaled by words or conduct. n119 There are many ways to make permission clear without verbalizing the word "yes," and permission certainly need not be in writing. But permission must be an affirmative indication of actual willingness. Silence and ambivalence are not permission.

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n119 See, e.g., WASH. REV. CODE ANN. @ 9A.44.010(6) (West 1988) (defining consent to mean "that at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse"); M.T.S., 609 A.2d at 1278 (defining consent as "affirmative and freely-given authorization for the specific act of sexual penetration").

n120 Contextual differences between surgery and sexual intimacy suggest somewhat different mechanisms for protecting autonomy in the two situations. The doctor's expertise can justify a special duty of disclosure, and the complexity of the risks may suggest the need for a conception of informed consent much more stringent than that which is appropriate in a sexual encounter.

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[*2182] Next, what if a woman does agree? What kinds of constraints violate her autonomy? Autonomy cannot mean freedom from all constraints upon choice, but it does entail freedom from those constraints that our culture identifies as illegitimate. The scope of that freedom is marked by the rights to bodily integrity and personal independence that existing legal principles already protect. n121 This modest conception of personal autonomy offers boundaries that are specific and, yet, far reaching.

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n121 See Schulhofer, supra note 75, at 69-71 (discussing the scope and objectives of legal protection of autonomous choice in the area of sexual intimacy).

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One example is sexual harassment in the workplace. This looks like an area that is hardly ripe for criminal sanctions. But if a supervisor tries to get sexual favors by offering a promotion (or by threatening to veto one), he is confronting the employee with alternatives (no matter whether we call them offers or threats) that his position gives him no right to impose. If the supervisor used his position to get an economic payoff from the employee, he would be guilty of extortion. n122 If a professor threatened to withhold a good grade or a good recommendation until he got some cash from a student, again he would be guilty of extortion. n123

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n122 See MODEL PENAL CODE @ 223.4 commentary at 223 (1980) (offering as an example of extortion the case of a "foreman in a manufacturing plant who requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination").

n123 See id. (noting as an example of extortion the case of a "law professor who obtains property from a student by threatening to give him a failing grade or to influence a prospective employer to hire someone else").

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The worker or student should have the same right to control her sexuality that she has to control her wages or her bank account. What makes the woman's consent invalid is not that the supervisor's act involves too much pressure. What makes the consent invalid is that rules already settled in our culture deny the supervisor the right to require an employee to choose between her promotion and her legally protected interests. One of those interests should be -- and is -- her sexual independence. For the same reason, the high school principal who allegedly obtained sex from a student by threatening to block her graduation n124 should certainly be guilty of a crime.

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n124 See supra text accompanying notes 106-07.

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[*2183] Two variations will make the implications clearer. Suppose that a highly paid fashion model wants to land a film role to enhance her career. The company's casting director says that unless she sleeps with him, she will not get the part. If you are looking for excessive pressure, this case will seem a lot harder than that of the student or employee. You may not feel sympathy for the model at all. But whether you feel sympathy or not, the violation of her autonomy is the same as in the previous cases. The man's action is extortionate, just as if he had insisted on a side-payment in cash. There is an improper constraint on the woman's freedom of choice under background rights that are already settled in our culture.

The converse of the model's situation, the "hard case" for this analysis, is that of a needy mother of four who finds a partner willing to support her. Suppose that the relationship deteriorates, and the man threatens to kick her out of the apartment unless she continues to meet his sexual demands. Obviously, the needy mother has far less freedom of choice than the successful fashion model does. But the relevant question has to be whether the man's threatened actions are illicit. In the model's situation, the pressure may be slight, but it is clearly impermissible. In the mother's case, the pressure, though severe, might not be illicit. A sexual quid pro quo is not a legitimate condition of ordinary employment, but sexual fulfillment is, for both men and women, an appropriate and valued goal of ongoing, intimate personal relationships. Thus, although the man's action in imposing a sexual condition on his willingness to continue his relationship with the needy mother could be criticized as insensitive in many contexts, it nonetheless involves an exercise of his autonomy that society ordinarily considers legitimate and worthy of social protection. It makes sense to ask whether the nature of the relationship is sufficient to give her a right to remain in the apartment or to receive financial support, and if she does have such a right, the man's threats should render any consent to sex invalid. But if existing norms do not protect her from this sort of economic pressure, then her decision to remain in the relationship, although highly constrained, is not improperly tainted, and her consent to sex would therefore be valid.

With these principles in mind, we can return to the cases mentioned earlier -- the man who takes the woman's car keys and the man whose intimidated

girlfriend no longer tries to fight back. In the first case, there is a kind of consent, ultimately the woman says "OK," but the consent is tainted by a clear violation of her right to leave. In the second case, there is never any affirmative permission [*2184] at all. These cases make clear that one thing missing in the law of rape is some way to punish sexual misconduct that is not physically violent. It is as if we had a law against armed robbery but no law against theft. The way to fill that gap is not to try expanding what we mean by force but to have statutes punishing, as an offense distinct from forcible rape, any sexual imposition without valid consent. Thus, the men in these two cases should, at a minimum, be convicted of sexual misconduct.

We get these results without having to sort out degrees of force and without having to treat women as dominated or disempowered. The key is in the background structure of rights and privileges that determine what uses of personal power and institutional position are permissible, against either the weak or the strong, against either men or women in our society.

This approach identifies a baseline of existing rights, and it leaves room for evolution in the standards for valid consent. Respect for a woman's autonomy should mean that her interest in controlling her sexual choices receives just as much protection as any person's interest in controlling her property, her labor, or her freedom of action in other areas of life.

IV. SENTENCING

I turn now to a set of problems facing female offenders. Women constitute an ever-increasing proportion of all defendants, and they are facing increasingly serious charges, especially in the federal courts. n125 One explanation attributes these changes to women's increasing independence and growing participation in the workforce. n126 But this "liberation hypothesis" is now generally discredited as an explanation for women's apparently rising crime [*2185] rate. n127 Thelma and Louise notwithstanding, economic and psychological liberation seem to play a small role in accounting for the growth in women's rates of offending. n128 Far more important factors appear to be the feminization of poverty and the "War on Drugs." n129

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n125 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON 3 (1994) [hereinafter WOMEN IN PRISON 1994] ("[T]he number of women sentenced for a violent offense rose from 8045 to 12,400 during the [1986-1991] period."); RITA J. SIMON & JEAN LANDIS, THE CRIMES WOMEN COMMIT, THE PUNISHMENTS THEY RECEIVE 78 (1991) (reporting that from 1980 to 1985, the female incarceration rate increased from 11 per 100,000 to 17 per 100,000).

n126 See, e.g., FREDA ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL 13-15 (1975) (claiming that women's advances in "fields of legitimate endeavor" have been paralleled by advances in "the world of major crimes"); RITA J. SIMON, WOMEN AND CRIME 19 (1975) (noting that a major hypothesis regarding women's criminality is that women's participation in financial and white collar crimes should increase as their participation in the workplace increases, as such participation will expose them to greater opportunities for committing such crimes).

n127 See Joseph G. Weis, Liberation and Crime: The Invention of the New Female Criminal, CRIME & SOC. JUST., Fall-Winter 1976, at 17, 17 (challenging the assertion that a causal relationship exists between women's liberation and their criminal behavior).

n128 See, e.g., Roland Chilton & Susan K. Datesman, Gender, Race, and Crime: An Analysis of Urban Arrest Trends, 1960-1980, 1 GENDER & SOC'Y 152, 167-68 (1987) (arguing that the most plausible explanation for rising women's crime rates, in particular black women's crime rates, is their declining economic situation).

n129 See id.

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Along with the increase in the number of women facing long sentences is a major shift in the way they are sentenced. Until the late 1970s, American sentencing judges had essentially unbridled discretion. n130 This approach seemed to help women, as they often received less severe punishment than men convicted of similar crimes. n131 The reason for this preferential treatment remains unclear. Some of the differences seem traceable to something like "chivalry" -- male judges felt protective toward a female defendant, except when she violated gender norms by committing a violent crime. n132 Probably a more important factor was judges' desires to protect the children of convicted women. n133 In any event, discretion helped women, although maybe not for the right reasons.

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n130 See Stephen J. Schulhofer, Due Process of Sentencing, 128 U. PA. L. REV. 733, 735-37 (1980) (describing sentencing regimes that were common until the 1970s).

n131 See Ilene H. Nagel & John Hagan, Gender and Crime: Offense Patterns and Criminal Court Sanctions, in 4 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 91, 129-34 (Michael Tonry & Norval Morris eds., 1983) (finding that women receive preferential treatment in the sentencing process); Darrell Steffensmeier & John H. Kramer, Sex-Based Differences in the Sentencing of Adult Criminal Defendants: An Empirical Test and Theoretical Overview, 66 SOC. & SOC. RES. 289, 297 (1982) (finding that "[p]referential treatment of female defendants appears to be consistent . . . across most offense categories").

n132 See Nagel & Hagan, supra note 131, at 112-15 (articulating the "chivalry/paternalism thesis").

n133 See Kathleen Daly, Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing, 3 GENDER & SOC'Y 9, 19-22 (1989) (discussing the significant influence that the protection of children has on the sentencing of female defendants).

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But that was the 1950s and 1960s. In the 1990s, sentencing discretion has gone the way of the dinosaur, especially in the federal courts. The new order is dominated by mandatory minimums and inflexible guidelines. n134 Part of the

egalitarian spirit of our age is [*2186] the directive in the Sentencing Reform Act of 1984 that federal sentencing guidelines must be "entirely neutral" as to the race, socioeconomic status, and sex of the offender. n135

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n134 See Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 AM. CRIM. L. REV. 833, 851 (1992) (stating that "[t]he federal sentencing process is pervaded by unwarranted similarities in the treatment of substantively distinguishable cases"); Stephen J. Schulhofer, Rethinking Mandatory Minimums, 28 WAKE FOREST L. REV. 199, 200-02 (1993) (describing mandatory minimums and their goals).

n135 Pub. L. No. 98-473, tit. II, ch. II, @ 217(a), 98 Stat. 1987, 2019 (codified as amended at 28 U.S.C. @ 994(d) (1988)).

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In practice, that neutrality has been a mixed blessing. To illustrate the paradoxes of neutrality, I will outline the structure of sentencing under guidelines in the federal courts and then take up three issues that pose special problems for women: pregnancy, children, and recidivism.

A. The Federal Sentencing Guidelines

The guidelines promulgated by the United States Sentencing Commission establish a normal sentencing range for each offense and identify aggravating and mitigating factors that either alter the normal sentence range or provide an authorized basis for an upward or downward departure. n136 Circumstances not identified by the Commission are impermissible grounds for upward or downward departure unless they involve some factor "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." n137 Applying the egalitarian mandate of the Sentencing Reform Act of 1984, the Commission listed a number of factors that ordinarily cannot justify a departure from the guideline sentence. n138 Among the factors "not ordinarily relevant" are age, mental and emotional conditions, physical condition, and family responsibilities. n139 Gender is even more suspect. This factor, the Commission has said, is never relevant. n140

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n136 See 18 U.S.C.S. app. @ 1A (Law. Co-op. 1994); see also Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 HOFSTRA L. REV. 1, 8-31 (1988) (explaining the background and operation of this system).

n137 18 U.S.C. @ 3553(b) (1988).

n138 See 18 U.S.C.S. app. @ 5H (Law. Co-op. 1994) (listing offender characteristics not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range).

n139 18 U.S.C.S. app. @ 5H1.1 (regarding age), @ 5H1.3 (regarding mental and emotional conditions), @ 5H1.4 (regarding physical conditions), @ 5H1.6 (regarding family responsibilities).

n140 See 18 U.S.C.S. app. @ 5H1.10.

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[*2187] Against the background of prior judicial sentencing practices, these changes will clearly produce more severe sentences for women. That in itself cannot tell us that the changes are wrong. A woman convicted of a crime should face the same penalty as a similarly situated man. But there are several special problems. The following section explores the problems for women that are presented by this seemingly sensible conception of neutrality.

B. The Paradoxes of Neutrality

1. Pregnancy

The first problem for a neutrality approach is that men do not get pregnant. Yet in United States v. Pozzy, n141 the First Circuit held that a defendant's pregnancy ordinarily cannot justify reducing a long prison sentence that the Guidelines would otherwise require. n142

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n141 902 F.2d 133 (1st Cir.), cert. denied, 498 U.S. 943 (1990).

n142 See id. at 138-39. On occasion, district judges in the Second Circuit have granted downward departures on the basis of pregnancy, without being challenged on appeal. See Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 PEPP. L. REV. 905, 948 (1993) (discussing Second Circuit cases that neglected to follow the standard set forth in Pozzy).

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The intuition that Pozzy sets an unjustifiably harsh rule is understandable, and critics of the Guidelines sharply attacked it. Professor Albert Alschuler n143 and Professors Marc Miller and Daniel J. Freed n144 argue that the holding in Pozzy is unsound. Professor Myrna S. Raeder, in the most comprehensive study on the issue, concludes that "[u]nquestionably, pregnant women . . . should be eligible for downward departures in the current Guidelines regime." n145

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n143 See Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. CHI. L. REV. 901, 911 (1991) (criticizing Pozzy).

n144 See Marc Miller & Daniel J. Freed, Offender Characteristics and Victim Vulnerability: The Differences Between Policy Statements and Guidelines, FED. SENTENCING REP., June-July 1990, at 3, 3-4 (criticizing restrictions on the departure power in cases such as Pozzy).

n145 Raeder, supra note 142, at 949.

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This issue, however, is a troubling one, not only for fair sentencing policy, but for women's interests in particular. No one likes sending a pregnant woman to prison. But convicted men enter prison with serious medical problems too. For too long, women's interests have been undermined by practices that singled out [*2188] pregnancy for different treatment than that accorded health problems in general. n146 Our starting point on this question should therefore be the assumption that, all else equal, we will strive to treat pregnancy like other medical conditions. Pregnant women, therefore, should probably lose on their claim to special treatment, unless there is reason to treat pregnancy differently from the health problems that male inmates suffer.

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n146 See, e.g., Geduldig v. Aiello, 417 U.S. 484, 494 (1974) (holding that the exclusion of pregnancy from disabilities covered under a California statute did not deny women equal protection of the law).

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One special feature of pregnancy is that poor medical care in prison may endanger not only the offender but an innocent party, the child. If the prison cannot provide safe birthing facilities and adequate neonatal care, there is surely a case for special treatment. But because pregnancy, unlike other medical problems, is a shortterm condition, a sentence reduction is not necessary to deal with this concern; the judge can simply delay the date of entry into prison until after the child is born. n147 In any event, pregnant inmates are no longer unusual, and many state and federal prisons now provide modern facilities that can equal or exceed the quality of care these women would be likely to receive in the outside world. n148

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n147 This approach will raise a new question, of course: how to deal with the offender who has responsibility for an infant child. Under some (but by no means all) circumstances, such family responsibilities could justify more lenient punishment of the convicted mother. For a discussion of this issue, see infra notes 151-60 and accompanying text.

n148 See, e.g., Anita G. Huft et al., Care of the Pregnant Offender, 3 FED. PRISONS J. 49, 51 (1992) (discussing the health-care facility at Lexington, Kentucky for federal inmates who have high-risk pregnancies).

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Other major differences between pregnancy and the medical concerns of male inmates tend to undermine claims for special treatment. Pregnancy usually is not life-threatening, and it often occurs by choice, unlike cancer, for example. As a result, any rule allowing sentence reductions for pregnancy would have unique potential for manipulation. n149 I am not enthusiastic about the results in the pregnancy cases, but on balance the courts are right to disregard pregnancy in most circumstances. n150

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n149 Cf. United States v. Arize, 792 F. Supp. 920, 921 (E.D.N.Y. 1992) (granting downward departure where a female drug courier was unaware of her pregnancy at the time of the offense and where loss of child custody was possible).

n150 The issue needs to be approached case-by-case because pregnant offenders (many of whom have drug or alcohol problems) often face high-risk pregnancies. If a jurisdiction's prisons do not have appropriate obstetrical services available, there is a strong case for special consideration. But a similar point can be made with respect to other medical conditions that cannot be treated properly in prison. A male inmate's health problems ordinarily endanger only the offender himself, but improper treatment and consequent risks of permanent injury or death are not permissible punishments for whatever offense sent the offender to prison. See Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment), cert. denied, 434 U.S. 974 (1977).

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[*2189] 2. Family Ties

Although pregnancy ordinarily should not be treated differently from the medical problems that men suffer, a "neutral" approach to family ties is a different matter. In the old days, white-collar defendants were able to win leniency by using their family responsibilities to evoke sympathy. n151 Judges were reluctant to take the breadwinner away from his children, and the ignominy of accusation and conviction were often viewed as substantial sanctions for the white-collar defendant. n152 That instinct helped middle-class offenders, but the unemployed, especially underclass blacks, often received harsher sentences. n153 The Sentencing Commission responded to the race and class biases of the old system by specifying that community ties, employment, and family responsibilities ordinarily will not justify a departure from the guideline sentencing range. n154

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n151 See STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 152-54 (1988) (reporting that prior to the recent sentencing guidelines, judges imposed either short sentences or no prison term on white-collar offenders "to avoid eliminating the [offender's] contribution to community and family").

n152 See id. at 144-45 (reporting that judges typically considered public indictment, conviction, and loss of community status to be significant forms of punishment for the white-collar offender and that "[m]ost judges . . . wonder whether the imposition of additional suffering is justifiable").

n153 Available statistical studies do not, however, show unambiguous racial disparities in sentencing. See 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 93 (Alfred Blumstein et al. eds., 1983) (noting that "[w]hile there is no evidence of a widespread systematic pattern of discrimination in sentencing, some pockets of discrimination are found for particular judges, particular crime types, and in particular settings").

n154 See 18 U.S.C.S. app. @ 5H1.5-.6 (Law. Co-op. 1994) (stating that employment records, family ties and responsibilities, and community ties "are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range").

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This is generally a sensible rule, but as usual, it was crafted with men in mind. The "family responsibility" rubric is the same, but the real problem is different when the defendant is a woman with three preschool age children. Compared to a male prisoner, a female prisoner [*2190] is twice as likely to have dependents who lived with her prior to her incarceration. n155 A welfare check can often replace the only kind of family support that many male offenders ever provide, but when the mother goes to prison, the children lose their primary caretaker. This may not be a disaster for the children if the parent is an abusive drug addict or if close relatives can offer a stable and supportive home. But children are much more likely to face problematic alternatives when the incarcerated parent is their mother. Among male prisoners who have minor children, 88.5% report that the children are living with their mother, while only 22.1% of the female prisoners with minor children report that those children are living with their father. n156 When long-term imprisonment of the mother will mean uncertain placements in foster care for all of a child's formative years, the social cost of "neutral" policy can be enormous. Yet 10.5% of female inmates (compared to only 1.7% of male inmates) have children who are assigned to a foster home or to an institutional placement after the parent's incarceration. n157

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n155 In 1986, 52.6% of all female prisoners, but only 27.5% of all male prisoners, had been living with minor children just before they entered prison. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WOMEN IN PRISON 6 (1991) [hereinafter WOMEN IN PRISON 1991] (noting that 67.5% of female prisoners, but only 54.4% of male prisoners, had minor children when they entered prison, and that among the prisoners who had minor children, 78% of the women, but only 50.5% of the men, had lived with those children before entering prison).

n156 See id.

n157 See id. (noting that percentages are based on those inmates who had children under age 18).

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The rule making family ties irrelevant thus creates a false equality between offenders in very different situations. It also makes fairness among offenders the sole question, when fairness to the children should be one of the court's major concerns. Equal treatment here -- if it is equal treatment -- can have a devastating effect on young lives. Yet in most of the federal circuits, courts have been "fairly hostile to child-based departures," n158 even when the offender was the single mother of five young children. n159 As a result, the [*2191] equal treatment concept has been a disaster, not just for women, but for sensible policy. What we now need is more discretion, and more recognition of family ties as a legitimate basis for a shorter sentence or a less

restrictive type of incarceration.

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n158 Raeder, supra note 142, at 945; see also United States v. Bieri, 21 F.3d 811, 814, 817-18 (8th Cir.) (denying downward departure when both the mother and father of two children, ages four and seven, were convicted of drug violations), cert. denied, 115 S. Ct. 208 (1994).

n159 See United States v. Headley, 923 F.2d 1079, 1082-83 (3d Cir. 1991) (finding that although the district court had the power to depart downward when sentencing a mother of five, no court that had considered the issue had found parenthood to be an extraordinary circumstance justifying such a departure); cf. United States v. Chestna, 962 F.2d 103, 107-08 (1st Cir.) (affirming the district court's denial of downward departure based on the convict's position as the mother of three young children), cert. denied, 113 S. Ct. 334 (1992). In the Second and Ninth Circuits, the courts have been somewhat more willing to view a female offender's family responsibilities as a permissible basis for a downward departure under some circumstances. See, e.g., United States v. Johnson, 964 F.2d 124, 129-31 (2d Cir. 1992) (affirming a downward departure based on extraordinary family circumstances consisting of the defendant having sole responsibility for raising four young children); Raeder, supra note 142, at 942-44 (discussing the Second and Ninth Circuits' willingness to grant a downward departure for single-parent mothers and noting one case in which the Tenth Circuit did so as well). On occasion, male defendants have benefitted from such departures as well. See, e.g., United States v. Sclamo, 997 F.2d 970, 972-74 (1st Cir. 1993) (affirming downward departure for a man who played an important role in the development of an emotionally disturbed child with whom he lived).

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Such an approach need not entail a formal privilege of special treatment for women as such, because departures presumably should be authorized for primary caretakers or single parents of either gender under appropriate circumstances. But the appearance of formal equality here should not by itself satisfy us that a special departure rule would be evenhanded and fair. The reality is that such a departure rule will not look, and will not be, fully neutral between the sexes. Nearly all of the offenders who will benefit from it will be women. n160 An overwhelmingly disproportionate impact of this sort should raise serious fairness concerns in most contexts. What makes such an impact tolerable in connection with sentencing is the manner in which the incarceration of single parents affects their children.

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n160 See supra notes 155-57 and accompanying text (discussing the fact that female offenders are much more likely than male offenders to have dependents living with them prior to incarceration, and noting that children are more likely to suffer when the incarcerated parent is their mother).

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3. The Likelihood of Recidivism

Recidivism poses a third problem for the equal treatment approach. A key factor in determining guideline sentencing ranges is the need for incapacitation, based on the likelihood of recidivism and especially the likelihood of future violence. Sentencing tables reflect judges' perceptions about the potential violence of the typical offender, n161 and of course the typical offender is male.

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n161 For example, in the federal system, the U.S. Sentencing Commission generally attempted to follow typical past practice in setting guideline sentencing ranges for both first offenders and repeat offenders. See Breyer, supra note 136, at 7 ("[I]n creating categories and determining sentence lengths, the Commission, by and large, followed typical past practice, determined by an analysis of 10,000 actual cases." (citations omitted)).

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[*2192] The danger that a first or second offender will return to crime, especially to violent crime, is not the same for women as it is for men. This is not simply a false stereotype. Nor is it an area where we can make accurate judgments by excluding group generalizations and by relying entirely upon facts other than the individual's gender. Women really are different in this respect. Whether as a result of nature or nurture, and in this case the differences are probably due to both, women (including female offenders) are far less prone to violent aggression than are men. n162

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n162 See supra text accompanying note 9. For a discussion of repeat violence by women who have already committed a first offense, see infra notes 182-83 and accompanying text.

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Modern equal protection doctrine seems strongly, perhaps unalterably, opposed to reliance upon statistical differences between the sexes as a basis for justifying categorical differences in treatment. In Craig v. Boren, n163 the Supreme Court held unconstitutional an Oklahoma law that prohibited the sale of 3.2% beer to males under the age of 21 but permitted sales to females over the age of 18. n164 The state got nowhere with statistics indicating that young males were more likely than females to drive while intoxicated. n165 The Court noted that the state's statistics were subject to "obvious methodological problems," and that properly analyzed, the "statistical disparities between the sexes [were] not substantial." n166 Nonetheless, the Court also stressed broader principles; it concluded that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." n167

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n163 429 U.S. 190 (1976).

n164 See id. at 190-91.

n165 See id. at 200-04.

n166 Id. at 202, 203 n.16. In one random survey of Oklahoma City drivers, bloodalcohol levels indicating intoxication were found in 14.6% of the male drivers and 11.5% of the female drivers. See id. at 203 n.16.

n167 Id. at 204.

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Although Craig v. Boren might be explained by the fragility of the statistical differences that the State invoked, the same is not true of Reed v. Reed, n168 Frontiero v. Richardson, n169 and Weinberger v. [*2193] Wiesenfeld. n170 In these cases the Court struck down efforts to use sex as a decision-making factor, even though sex appeared to have substantial value in predicting an admittedly important fact. In Reed, the state's apparent premise, in preferring men to women as administrators for decedents' estates, was that men were more likely than women to have experience in formal business matters. n171 In Frontiero and Wiesenfeld, Congress had mandated hearings on dependency for men but not for women seeking certain statutory benefits, on the ground that husbands were less likely to be dependent on their wives than vice versa. n172 The Court held that such generalizations, even if empirically accurate, could not justify categorically different treatment of the sexes. n173 The hostility to empirical generalization in these cases nonetheless may be explained by two facts. First, the differences between the sexes were themselves the products of gender discrimination and cultural impediments to women's ability to lead independent lives. Second, the facts for which gender was used as a proxy (business experience and dependency) could be ascertained more directly and more accurately by a factual hearing.

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n168 404 U.S. 71, 76-77 (1971) (holding that a statutory scheme that draws distinctions between sexes solely for administrative convenience violates the Constitution).

n169 411 U.S. 677, 690-91 (1973) (finding that statutes that accord "differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience" violate the Due Process Clause of the Fifth Amendment).

n170 420 U.S. 636, 637-39 (1975) (finding unconstitutional a gender-based differential in Social Security survivors benefits which discriminated against men whose wives were deceased); see also Califano v. Goldfarb, 430 U.S. 199, 201-02 (1977) (finding unconstitutional a gender-based differential in Social Security survivors benefits which required a widower to show dependence on his deceased wife).

n171 See Craig, 429 U.S. at 202 n.13.

n172 See Wiesenfeld, 420 U.S. at 644 (noting that "the framers of the Act legislated on the 'then generally accepted presumption that a man is responsible for the support of his wife and children'" (citation omitted)); Frontiero, 411 U.S. at 681 (surmising that Congress intended to make an economical law that took advantage of the fact that women tend to be the dependant spouse).

n173 See, e.g., Craig, 429 U.S. at 202 n.13; Frontiero, 411 U.S. at 688-89.

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Closer to the present problem -- that is, sharp, statistically valid gender differences that are not simply the results of past discrimination -- is City of Los Angeles v. Manhart. n174 In Manhart, the Supreme Court barred employers from using male-female differences in life expectancy as a basis for requiring women as a group to pay higher pension-annuity premiums. n175 Technically, Manhart held only that the salary differentials violated the nondiscrimination requirements of Title VII of the Civil Rights Act of 1964, n176 but the Court's [*2194] reasoning would seem to suggest that such differential treatment would, in the case of a public employer, violate the Equal Protection Clause as well. n177

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n174 435 U.S. 702 (1978).

n175 See id. at 707-11.

n176 Pub. L. No. 88-352, tit. VII, @ 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. @ 2000e-2(a)(1) (1988)) ("It shall be an unlawful employment practice for an employer . . . to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . .").

n177 See Manhart, 435 U.S. at 711. Because Manhart was a Title VII case, there was no need to prove that differential treatment was adopted because of, and not simply in spite of, the gender of the disadvantaged group. Cf. Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that a facially neutral classification violates the Equal Protection Clause only when there is proof of purposeful discrimination). But that requirement appears inapplicable in constitutional challenges to statutes that draw explicit distinctions along racial or gender lines. See, e.g., Craig, 429 U.S. at 204, 210 (holding that an explicit gender-based differential in an Oklahoma statute violated the Equal Protection Clause, without requiring proof of discriminatory purpose, when the differential was not substantially related to a legitimate statutory objective). In any event, the statutory holding in Manhart could be read to imply that categorical gender differences in sentencing guideline ranges would violate requirements of gender neutrality in the Federal Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, @ 217(a), 98 Stat. 1987, 2019 (codified as amended at 28 U.S.C. @994(d) (1988)), even if such sentencing differentials were supported by statistics indicating substantial gender differences in the rate and seriousness of recidivism.

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One obvious argument for gender distinctions in sentencing is that, in contrast to the pension-annuity situation, the purpose and the primary effect of differential treatment in sentencing would be to help women, not to impose additional burdens on an already disadvantaged group. n178 But the cases leave little if any room for the "benign purpose" path around the neutrality requirement of the Equal Protection Clause. Women were more favorably treated by the gender classifications held unconstitutional in Craig, Frontiero, and

Wiesenfeld. Only when more favorable treatment for women can be seen as compensating for disadvantageous conditions suffered by women in the past does the Court seem prepared to uphold genderbased affirmative action remedies. n179 If this perspective is controlling, the sentencing of female offenders seems a poor case for affirmative action preferences. Yet does it really make sense, either [*2195] in terms of fairness to women or in terms of effective crime control policy, to sentence female offenders to the same long incapacitative sentences that are thought necessary in the case of potentially violent males?

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n178 Of course, seemingly favorable treatment has the potential to reinforce stereotypes and thus to backfire in the long run. See Orr v. Orr, 440 U.S. 268, 283 (1979) (noting that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection"), cert. denied, 444 U.S. 1060 (1980). All "benign" preferences are subject to this caveat.

n179 See, e.g., Califano v. Webster, 430 U.S. 313, 317-18 (1977) (upholding a Social Security-related statute which provided higher old-age benefits for women); Schlesinger v. Ballard, 419 U.S. 498, 505-08 (1975) (upholding differential tenure periods for male and female naval officers); Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (upholding a statute granting a larger property tax exemption to women).

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The gender differences that we are considering are not small. In the Manhart case, the difference in annuity costs between men and women was found to be roughly 15%. n180 Sex-specific differences in the propensity for violence in the general population are roughly 800% -- eight to nine times higher for men than for women. n181 When the focus is narrowed to individuals who have already committed one offense, gender differences diminish but remain substantial. Young men begin their criminal careers earlier than young women, they commit more offenses of greater seriousness, and their criminal careers begin to taper off much later than those of the women. n182 In one study, the propensity for violence [*2196] among young offenders who had already committed one offense was three times higher for the men than for the women, and among those who had committed three offenses, 48% of the men but none of the women went on to commit further crimes. n183

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n180 See Manhart, 435 U.S. at 705.

n181 See supra text accompanying note 9; see also 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 25 (Alfred Blumstein et al. eds., 1986) [hereinafter CRIMINAL CAREERS] (noting that male arrest rates for violent crimes were 8.3 times greater than female rates for 1980); Darrell J. Steffensmeier, Sex Differences in Patterns of Adult Crime, 1965-77: A Review and Assessment, 58 SOC. FORCES 1080, 1090-92 (1980) (noting that male arrest rates for violent crimes were nine times greater than female rates for 1965 and eight times greater for 1977). Independent victimization data corroborate the arrest data and tend to negate any inference that differential arrest rates are due to differences in

willingness to report or arrest female offenders. See Michael J. Hindelang, Sex Differences in Criminal Activity, SOC. PROBS., Dec. 1979, at 143, 153 (suggesting that "sex is a central correlate of involvement in the crimes examined and cannot be dismissed as simply an artifact of biases in the processes culminating in arrest").

n182 See, e.g., Deborah W. Denno, Gender, Crime, and the Criminal Law Defenses, 85 J. CRIM. L. & CRIMINOLOGY 80, 82, 94, 104-06 (1994) (basing these conclusions on empirical data drawn from a longitudinal study of biological, psychological, and sociological predictors of crime). Similarly, female offenders released from prison are less likely to commit a subsequent offense and are much less likely to be returned to prison than are men. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 5 (1989) (finding that while 47.3% of men released from prison in 1983 were reconvicted within three years, only 38.7% of women were reconvicted); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RETURNING TO PRISON 4-5 (1984) (finding that in all states except Massachusetts, "the proportion of recidivists among males was substantially higher than for female releasees"). There is some limited evidence to the contrary. In one study of active heroin users, self-reported crime rates were quite similar for males and females, except for burglary, an offense for which the average male offender committed five times more offenses than the average female offender. See CRIMINAL CAREERS, supra note 181, at 67-68. On the basis of this data, the authors speculated that large differences in male and female arrest rates arise primarily from differences in rates of participation in crime, and that once active, females commit crime at rates similar to those of the active males. See id. at 67. This conclusion may, however, be an artifact of the focus on the population of active heroin users and appears to differ sharply from the results observed in birth cohort studies that draw upon a more representative sample of both offenders and the general population. See, e.g., Neil A. Weiner, Violent Criminal Careers and "Violent Career Criminals": An Overview of the Research Literature, in VIOLENT CRIME, VIOLENT CRIMINALS 35, 105 (Neil A. Weiner & Marvin E. Wolfgang eds., 1989) (finding the male rate of recidivism to be approximately three times higher for men than for women in the 1958 cohort); Denno, supra, at 105 (reporting that males are far more likely than females to be chronic repeat offenders and that "female chronics committed fewer and less severe crimes than their male counterparts").

n183 See Weiner, supra note 182, at 105.

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When the base expectancy of violence is substantially different for the sexes, and when gender gives us predictive information we probably cannot get in any other way, neutrality again becomes, in effect, a form of unjustified discrimination against women. Particularly in the case of sentences that have a large incapacitative component, such as recent "three strikes and you're out" legislation, n184 there is reason for some discretion to alter the normal sentence on the basis of gender, and perhaps other factors (such as age) that are indicative of low recidivism risk. From this perspective some gender-based differentials in sentencing should have sufficient justification to pass constitutional muster even under intermediatelevel or "strict" scrutiny. As in the case of family ties, there are good reasons to support sentencing rules that are not fully neutral between the sexes.

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n184 See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Title VII, @ 70001, Pub. L. No. 103-322, 55 Crim. L. Rep. (BNA) 2365-66 (to be codified at 18 U.S.C. @ 3559(c)) (requiring mandatory life imprisonment for defendants previously convicted of either two or more serious violent felonies, or one or more serious violent felonies and one or more serious drug offenses); CAL. PENAL CODE @ 1170.12(c)(2)(A) (West Supp. 1995) (requiring sentencing to an indeterminate term of life imprisonment in cases where the defendant has two or more prior felony convictions).

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V. PRISONS

Women's prisons are another major growth sector of the criminal justice economy. In 1980, there were over 13,000 women in federal and state prisons n185 and roughly 9000 in county jails. n186 We now have over 50,000 women in federal and state [*2197] prisons n187 and another 40,000 in county jails. n188 Over one million women are incarcerated in local jails at some point each year. n189 Since the early 1980s, the male prison population has grown by 112%, while the female prison population has grown by 202%. n190

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n185 See WOMEN IN PRISON 1991, supra note 155, at 7.

n186 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1991, at 13 (1993) [hereinafter CORRECTIONAL POPULATIONS] (basing estimates on 1978 data).

n187 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1992, at 4 (1993) [hereinafter PRISONERS IN 1992].

n188 See CORRECTIONAL POPULATIONS, supra note 186, at 9.

n189 Because jail stays are typically short and because jail census data reflect only the number of inmates in jail at any one time, such one-day census data greatly understate the total number of inmates incarcerated over the course of the year. In 1991, a total of over 1,187,454 women were admitted to jail, and 1,154,110 were released. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, JAIL INMATES 1991, at 2 (1992).

n190 See WOMEN IN PRISON 1991, supra note 155, at 1.

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The growing number of women in prison partly reflects the "equal treatment" stance that now governs sentencing. But equal treatment ends the minute the sentencing hearing is over. Once offenders enter the correctional system, men and women face entirely different regimes.

The differences do not always disadvantage women. Physical danger and insecurity are problems for some female prisoners, but these risks seldom compare to the pervasive threats of rape and physical assault that are

commonplace for male prisoners. n191

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n191 On the problem of rape in men's prisons, see supra note 13 and accompanying text.

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Female prisoners face other kinds of difficulties, however. Women are typically housed in facilities separate from men. n192 Moreover, because there are fewer women in prison, the facilities are usually smaller and draw from a much wider geographical area; most states have only one women's prison for the entire state. n193 In the federal system, the main prisons for women are in West Virginia, Kentucky, Texas, and California, so women from the Northeast and Midwest are often sent over one thousand miles from their homes. n194

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n192 See NICOLE H. RAFTER, PARTIAL JUSTICE: WOMEN, PRISONS, AND SOCIAL CONTROL 184 (2d ed. 1990) (reporting that of the 80 prisons that held women in 1988, 74% excluded males entirely, and several others were almost entirely segregated by sex).

n193 As of 1988, 44 of the states held all of their female inmates at one or two central locations. See id. at 181.

n194 See Sue Kline, A Profile of Female Offenders in the Federal Bureau of Prisons, FED. PRISONS J., Spring 1992, at 33, 36.

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[*2198] Differences in the programs available to male and female prisoners are striking. Men's prisons in Michigan offer vocational training in twenty areas, but until recently, the women's prison offered only five programs -- most focused on such skills as shortorder cooking and handicrafts. n195 In Idaho, the women's prison offers only two vocational programs, one of which teaches the women how to make decals. n196 In Louisiana, the only program for women is a sewing class. n197 In Montana, the women's prison has job slots available to only 18% of the inmates, and only two programs are offered -- sewing and data entry. n198 The Nevada prison system offers male inmates vocational training in a wide variety of positions, but the women can choose only from domestic jobs. n199 In Nebraska, the men's penitentiary offers a program leading to a college degree in business administration, while the women's prison offers only a certificate -- not a degree -- in "secretarial technology." n200

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n195 See Glover v. Johnson, 478 F. Supp. 1075, 1086-87 (E.D. Mich. 1979).

n196 See RAFTER, supra note 192, at 188.

n197 See id. at 187.

n198 See Memorandum of Professor Melissa Harrison Submitted to the Montana House Appropriations Committee (March 9, 1993) (on file with author).

n199 See McCoy v. Nevada Dep't of Prisons, 776 F. Supp. 521, 525 (D. Nev. 1991).

n200 The course in "secretarial technology" was instituted at the women's prison only when a lawsuit challenging unequal educational opportunities was set for trial. See Klinger v. Nebraska Dep't of Correctional Serv., 824 F. Supp. 1374, 1399-1402 (D. Neb. 1993), rev'd sub nom. Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994), and cert. denied, 115 S. Ct. 1177 (1995). Prior to that time, the Nebraska Department of Corrections had offered no on-site post-secondary education for its female prisoners, although it offered many college courses and degree programs to men. See Klinger, 824 F. Supp. at 1399.

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The problem here is not just that women are not offered the same programs provided for men. Consider the programs that are offered to the women: sewing, decals, handicrafts, and cooking. Visiting American prisons in the 1990s is like taking a time machine back to the high schools of the '50s, where the boys took Shop, and the girls learned cooking, baking, and sewing -- glorified under the name of Home Economics.

The major problems for women in American prisons are thus numbers and "nature." n201 The number of female prisoners is no longer so small, but it is still small relative to the number of men in prison. n202 This means fewer programs and greater separation [*2199] from families. Assumptions about women's nature mean that the programs which are offered tend to deny women the skills they need for economic and psychological independence.

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n201 See RAFTER, supra note 192, at 179 (noting that gender stereotypes motivate prison programming and affect staff attitudes toward female inmates).

n202 See PRISONERS IN 1992, supra note 187, at 4 (indicating that women constitute less than 6% of the inmates in American prisons).

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The third problem for female prisoners -- the third "N" -- is inertia. Because male prisoners outnumber women by about twenty to one, n203 and because male prisoners are much harder to control, men's problems and needs always dominate the agenda of prison administrators. What women get is the fourth "N" -- neglect. Or the fifth "N" -- nothing. Yet, what can be done?

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n203 See id.

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A. Constitutional Litigation

Female inmates have brought many equal protection challenges, but they have won few real victories. The lack of progress seems due, in part, to the kinds of problems that pervade all institutional reform litigation. In 1979, a federal district court found equal protection violations at Huron Valley, Michigan's only women's prison, where vocational and rehabilitational opportunities were substantially inferior to those afforded at the state's prisons for men. n204 Yet when the court attempted to appoint an independent administrator for the facility, after almost ten years of persistent noncompliance with the court's decree, the Sixth Circuit set aside the order because "[t]he record . . . strongly suggests that the district court has not attempted to exhaust a number of methods to enforce its order that are less intrusive." n205 The appointment of an independent administrator was finally upheld in 1991, fourteen years after the inception of the litigation. n206

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n204 See Glover v. Johnson, 478 F. Supp. 1075, 1083-94 (E.D. Mich. 1979).

n205 Glover v. Johnson, 855 F.2d 277, 287 (6th Cir. 1988).

n206 See Glover v. Johnson, 934 F.2d 703, 713-15 (6th Cir. 1991).

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Most class action suits on behalf of female prisoners have ended in settlements, with consent decrees promising improvement in facilities and vocational opportunities. n207 Yet gains have been modest because the consent decrees have proven difficult to enforce and because states can avoid equal protection problems by simply cutting back on facilities and programs made available to more favorably treated prisoners. n208

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n207 See RAFTER, supra note 192, at 201-02.

n208 See Molar v. Gates, 98 Cal. App. 3d 1, 20 (4th Dist. 1979) (finding that the state can comply with equal protection requirements by simply abolishing special privileges afforded male prisoners rather than granting them to women); see also RAFTER, supra note 192, at 202 (noting that "[e]ven when a court decides in favor of inmates, the result is usually only another long struggle to achieve compliance"); Judith Resnik, The Limits of Parity in Prison, J. NAT'L PRISON PROJECT, Fall 1987, at 26, 28 (noting that "[e]quality can be achieved either by bringing one group up to the other or by reducing the benefits of the group that was 'better off'").

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[*2200] Beyond these familiar difficulties shared by all reform litigation are a series of problems that grow out of the unique complexities of gender. Does the Fourteenth Amendment require neutrality and equal treatment, or do differences between men and women permit different programs and facilities for the two groups? The contending "isms" of modern feminism do not help much here, and the theoretical debate over "sameness" versus "difference" has shed little

light on the issues.

In Canterino v. Wilson, n209 a federal district court found substantial disparities between the programs available to Kentucky's male and female prisoners. Women had fewer opportunities to qualify for work-release and study-release programs; they were often denied minimum-security classification (and thus denied eligibility for release programs) simply because of an assumption that any social contact with men would lead to pregnancy. n210 The court held that the women had been denied equal protection, n211 but the Sixth Circuit vacated and remanded, holding in a brief opinion that there was no proof that the lesser programs had been afforded to the women because of their gender. n212

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n209 546 F. Supp. 174 (W.D. Ky. 1982).

n210 See id. at 204-06.

n211 See id. at 206-08.

n212 See Canterino v. Wilson, 869 F.2d 948, 954 (6th Cir. 1989).

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The Eighth Circuit was more explicit in Klinger v. Department of Corrections. n213 The court there held that substantial differences between programs at Nebraska's men's and women's prisons, including vocational training for female inmates that was limited to traditional "women's" occupations and the denial of college-credit courses, did not violate equal protection because the male and female prisoners were "not similarly situated for purposes of prison programs and services." n214 The court supported that conclusion by noting that, compared to the women's prison, the men's prison housed six times as many inmates, had a higher security rating, and the average stay for its inmates was two to three times longer. n215 The court also noted that the female inmates were more likely to be [*2201] single parents and victims of physical or sexual abuse, while the male inmates were more likely to be violent and predatory criminals. n216 Ironically, the fact that the female inmates were less violent offenders, incarcerated for shorter periods, for less serious crimes, became the basis for justifying less generous programs for the women.

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n213 31 F.3d 727 (8th Cir. 1994), cert. denied, 115 S. Ct. 1177 (1995).

n214 Id. at 731.

n215 See id.

n216 See id. at 732.

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The Klinger court's justification for disparate treatment of women in prison stands in sharp contrast to the approach of cases like Reed v. Reed n217 and

Craig v. Boren. n218 Many of the differences between the male and female inmate groups are solely the result of the state's decision to segregate them in separate facilities. Differences between the men and the women that are not state created could be relevant for some purposes. I have argued, for example, that the less violent character of female offenders can sometimes justify shorter sentences for them as a group. n219 Such differences likewise might have a legitimate bearing on the kinds of programs best suited to the needs of particular offenders. But since gender in this context is a crude proxy for the rehabilitative needs of the individual inmate, statistical generalizations, even if valid, cannot justify conclusive gender-based categories that preclude an individual factual inquiry. n220 Nor, in any event, can any differences between the sexes justify denying women higher education and well-paid jobs that they need as much as men do. In the Nebraska prisons, the programs for women are not only different in content but simply less generous in every respect.

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n217 404 U.S. 71 (1971).

n218 429 U.S. 190 (1976).

n219 See supra notes 161-84 and accompanying text.

n220 See supra text accompanying notes 163-84.

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Although the Klinger court's use of dissimilar situations to obviate any equal protection inquiry is surely incorrect, it is more difficult to specify what the nondiscrimination principle affirmatively requires in terms of programs and facilities for female prisoners. The constitutional mandate is obscure, in part, because there is little agreement about what the right policy directions for reform should be. The history of prior reform efforts is not encouraging.

[*2202] B. The Policy Dilemmas and Their History

Feminist concern for women in prison predates modern feminism by close to a century and mirrors many of the modern themes. Until the latter part of the nineteenth century, female prisoners were usually housed at the same locations as the men, although often in a separate wing or annex of the men's buildings. n221 Typically, large numbers of women were thrown together in a single large cell, long after the penitentiary system of oneperson cells had been introduced for the men. n222 The women were also vulnerable to all kinds of exploitation by male prisoners and guards. n223 In all other respects, female prisoners were ignored. n224

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n221 See RUSSELL P. DOBASH ET AL., THE IMPRISONMENT OF WOMEN 61 (1986) (discussing the separation of women into exclusive female wings and the appointment of separate female wardens and matrons in British prisons in the mid-nineteenth century); RAFTER, supra note 192, at 7 (noting that the Women's Annex built in 1837, adjacent to the Ohio Penitentiary, was one of the first structures designed specifically for female prisoners); Lucia Zedner, The Prison for Women, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN

WESTERN SOCIETY (Norval Morris & David J. Rothman eds., forthcoming 1995).

n222 See RAFTER, supra note 192, at 4.

n223 See DOBASH, supra note 221, at 61 (noting that in the mid-nineteenth century United States, "women were held in cramped, insanitary gaols and often subjected to sexual assaults by wardens").

n224 See RAFTER, supra note 192, at 5 (noting that as a general rule "female prisoners almost wholly lacked supervision").

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The enlightened response to nineteenth century prison conditions was what became known as the Reformatory Movement. n225 It stressed rehabilitation for both male and female prisoners, and its guiding principle for the women was separation -- women were to be housed in separate facilities, supervised by a separate staff of female guards and administrators. n226 The Reformatory Movement was very modern in stressing how women's different needs created a strong case for separate treatment under the benevolent guidance of female supervisors. n227

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n225 See id. at 23-82.

n226 See id. at 184.

n227 See id. at 41-51. Similar themes were evident in the development of the federal government's first prison for women at Alderson, West Virginia. See Claudine SchWeber, "The Government's Unique Experiment in Salvaging Women Criminals": Cooperation and Conflict in the Administration of a Women's Prison -- The Case of the Federal Industrial Institution for Women at Alderson, in JUDGE, LAWYER, VICTIM, THIEF: WOMEN, GENDER ROLES, AND CRIMINAL JUSTICE 277, 284-85 (Nicole H. Rafter & Elizabeth A. Stanko eds., 1982) (noting that a mostly female staff ran Alderson).

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[*2203] The Reformatory Movement's approach to female prisoners had two serious flaws. First, it linked its conception of women's special needs and special capacities for rehabilitation to a program that stressed training in household tasks and domestic service outside the home. n228 Second, it focused primarily on the needs of white working-class offenders, many of them morals offenders who would not have been in prison at all if they were men who had engaged in similar conduct. n229 Underclass and minority women usually remained in strictly custodial institutions, often in wings of a male prison, and faced extremely harsh regimes of punishment. n230

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n228 See RAFTER, supra note 192, at 39 (noting that vocational programs focused on training female inmates in domestic skills).

n229 See id. at 35-36 (noting that women were committed to reformatories under long-term sentences on convictions of fornication, drunkenness, and other minor crimes for which men typically were not sent to prison at all).

n230 See id. at 87 (noting that in 1930 Tennessee, "[t]he situation was especially grim for black women" and that "the 'Negro Wing' was 'almost constantly overcrowded'" (citation omitted)).

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Nonetheless, for all its flaws, the Reformatory Movement was a significant step forward for its time. It survived and prospered from the 1870s until the 1930s. Then a new round of progressive reforms, which focused on corruption in and mismanagement of men's prisons, led to pressures for greater professionalism, more centralized management, and control over the fiefdoms of individual wardens in both male and female prisons. n231 This development had nothing to do with the women's prisons per se, but it doomed their creativity and independence. n232 After the 1930s, separate women's prisons remained, but they dealt in punishment; innovative programs were eliminated; women remained separate, and once again they were neglected. n233

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n231 See Sch Weber, supra note 227, at 287, for an account of these developments in the federal system. In the individual states, women's reformatories were also undermined by the financial stresses of the 1930s. Throughout the country, prison administrators who were pressured for space in their maximum security prisons transferred out the hard-core female felons who had been held there; these women then had to be housed at reformatories. See RAFTER, supra note 192, at 81-82. The population of less serious offenders who had made up the group in women's reformatories was either severely diluted by the serious felons or was pushed out entirely (and transferred to local jails) to make room for offenders who were not suited to the rehabilitative focus of the reformatory approach. See id.

n232 See SchWeber, supra note 227, at 298-99 (chronicling the effects of this change at Alderson, West Virginia).

n233 See RAFTER, supra note 192, at 81 (detailing the demise of the Reformatory Movement).

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[*2204] In the 1970s, reformers again drew attention to the neglect of female prisoners. The 1970s reformers attributed most of the problems to the prevailing policy of separating and centralizing the female inmates. n234 The preferred solution was called cocorrections, essentially coed prisons, where men and women housed in the same buildings share many programs and facilities. n235 The idea was to reduce geographical displacement and permit cost-effective delivery of services. n236 Building on the same insight, a 1985 law review note argued that sexually segregated prisons violate the Equal Protection Clause and that a gender-neutral system of inmate assignment for most offenders is constitutionally required. n237

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n234 See Claudine SchWeber, Beauty Marks and Blemishes: The Coed Prison as a Microcosm of Integrated Society, PRISON J., Spring-Summer 1984, at 3, 4-5.

n235 See id.

n236 See id. at 3.

n237 See Rosemary Herbert, Note, Women's Prisons: An Equal Protection Evaluation, 94 YALE L.J. 1182, 1182 (1985).

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Coed prisons have been tried extensively since the 1970s, but generally they have been a disaster for women. When small numbers of women are dispersed to coed prisons, they are vastly outnumbered by the men at each site. Men's needs dominate, and once again the women get neglected, even more so than before. n238 There is also a concern about safety and security. You do not have to be a rocket scientist to foresee that there will be security problems when you mix men and women in coed prisons. It is the men who pose the problem, but it is much harder to restrict and supervise the movements of 500 men than to guard closely forty or fifty women. So the women bear the brunt of tight security measures in coed prisons. n239

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n238 See RAFTER, supra note 192, at 204 (noting, for instance, that in coed prisons "men forced women out of programs by assuming a right to the best positions").

n239 See SchWeber, supra note 234, at 6-7 ("The burden of upholding this [no physical contact] policy falls heaviest on women inmates who must often be escorted or whose activities must be supervised.").

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By the late 1980s, most women's advocates and prison administrators had lost their enthusiasm for coed prisons. n240 There remain several mixed-sex prisons, but they retain few features of the coed model: prisoners are tightly separated by sex, and there is little sharing of programs and facilities; n241 in a few instances the [*2205] only coed feature is the housing in a mainly female prison of a small number of much older, minimum security males. n242 For all practical purposes, the coed movement is now virtually dead. n243

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n240 See RAFTER, supra note 192, at 184 (describing the demise of the coed movement).

n241 New York's Albion Correctional Facility, for example, housed 332 men and 116 women, but the sexes were segregated from one another except in prison industries and food service jobs, college and health service classes, visiting, and certain special programs. See SchWeber, supra note 234, at 5.

n242 An example is the 93% female prison at Clinton, New Jersey. See id.

n243 See RAFTER, supra note 192, at 184.

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C. Toward Effective Solutions for Female Prisoners

The difficulties of cocorrections drive us back to separating the women, probably -- for many states -- in a single, centralized facility. That means that the best hope for female prisoners may be a doctrine of separate but equal. No one wants to invoke Plessy v. Ferguson n244 as a shining model, but what is abhorrent for the races in education may be a sensible solution for the sexes in prison.

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n244 163 U.S. 537, 548 (1896) (holding that the separation of passengers of different races into separate railroad cars does not violate the Fourteenth Amendment). Plessy became the basis for the doctrine of separate but equal in education. See Brown v. Board of Educ., 347 U.S. 483 (1954) (overruling Plessy).

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A separate but equal approach will require us to have a concrete working conception of equality, a daunting task in this context. It makes little sense to afford weightlifting facilities for large numbers of inmates, as in men's prisons, if the women are not interested in using them. Nor does it make sense to deny women programs they do want (like courses in child rearing and prenatal care) just because such programs are not offered to or demanded by men. Inmate needs and preferences are one helpful measure of the kinds of services that should be offered, but this yardstick must be used cautiously, lest programs simply mirror and reinforce role stereotypes that the offenders bring with them to prison. Preparation for jobs and the enhancement of marketable skills should be priorities. Yet effective pursuit of these goals will sometimes require different programs for the women. And expenditure levels for men and women probably should not be held to strict per-capita equality, since program costs can be much higher for small groups of women than for large groups of men.

The search has to be for parity in the services delivered to women and to men. What is needed is what I would call "comparable worth" at the receiving end of the programs. Judged by this standard, the programs afforded to female inmates in the Nebraska prison system, although upheld by the court in Klinger, n245 should [*2206] clearly be regarded as constitutionally inadequate. Comparable worth may not be the best solution for wage discrimination in the labor market, n246 but it does make sense in assessing programs for women in prison.

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n245 See supra text accompanying notes 213-16.

n246 See, e.g., Daniel R. Fischel & Edward P. Lazear, Comparable Worth and Discrimination in Labor Markets, 53 U. CHI. L. REV. 891, 918 (1986) (noting

that comparable worth "has none of the appropriate incentive effects and fails to provide compensation for past wrongs to the appropriate parties"); Paul Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1756-79 (1986) (discussing the difficulties of adopting the comparable worth approach); cf. Mary E. Becker, Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear, 53 U. CHI. L. REV. 934, 940 (1986) (developing a case in favor of comparable worth).

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No one concept or doctrine, of course, will magically solve all of the difficulties. As in the other areas of criminal justice I have surveyed, theoretical conceptions of neutrality, preferential treatment, empowerment, and the like are much less important than the particular strategies used to make feminist goals operational. Plausible ideas can easily backfire unless they are rooted in a close analysis of legal and institutional processes, and unless they are coupled with adequate funding and political support. That makes reform especially tricky in prisons, because when it comes to providing services for drug sellers and other offenders, funding and political support are not in overabundant supply. n247

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n247 See Resnik, supra note 208, at 28 (noting that "[a]s overcrowding increases and interest in rehabilitation diminishes, many vocational and educational programs are reduced").

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CONCLUSION

The four topics discussed in this Article make clear the overriding importance of particulars. Some may wonder whether the topics are representative -- whether I have selected four unusually intractable problems. But if we wanted to pick issues for their intrinsic importance to female victims and female offenders, could we skip domestic violence, rape, sentencing, and prisons?

In stressing the particular and the concrete, I do not aim to deprecate the contributions of theory. As indicated at the outset, my concern about the limits of theory states a dilemma. We need theory, but theory cannot do all the work. The sweeping generalizations of high theory provide excitement in preaching to the choir, but too often they prove inapt, unhelpful, or positively counterproductive [*2207] when the time comes to address the problems of working institutions and the task of producing real improvement for women.

Many strands in contemporary feminism emphasize the importance of context and particulars as sources of insight into social and legal conditions that are oppressive to women. n248 A comparable insistence on doctrinal and institutional specifics is often lacking, however, in the discussion of proposals to redress these conditions. What has been missing from the dialogue, and is now most needed, is a feminism of process and particulars, a recognition that real solutions are likely to lie very deeply embedded in the details.

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n248 See, e.g., Bartlett, supra note 6, at 849-63 (discussing feminists who emphasize reasoning from context); see also Margaret J. Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699, 1707 (1990) (noting that "[p]ragmatism and feminism largely share . . . the commitment to finding knowledge in the particulars of experience").

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Because details are critical, and because change itself is guaranteed to bring problems, a natural reaction is that the status quo is not invidious after all. A common response to the feminist challenge is just the point with which I began -- the recognition that bringing women into the equation is hard to do. For skeptics, this recognition translates into a do-nothing conclusion. The difficulty of social and legal change is where the discussion stops. My approach in this Article has been different. The difficulty of change was where I started. Change is difficult. But it is also long overdue.

LEVEL 1 - 71 OF 96 ITEMS

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NOTE: Computer-Generated Child Pornography - Exposing Prejudice in Our First Amendment Jurisprudence?

Vincent Lodato

SUMMARY:
... When confronted with the issue of child pornography, most Americans find no problem with punishing those who create, sell, distribute, or possess visual images of children engaging in sexually explicit conduct. ... Although Ferber held child pornography to be unprotected speech under the First Amendment, limits were put on the government's ability to proscribe such material. ... Based on the limitations created by Stanley and Ferber, the Osborne Court held that states could prohibit the mere possession of child pornography, provided their purpose was to protect children from the harms caused by the production of child pornography and not to regulate people's thoughts and expressions. ... Most pertinent, the Hatch Amendment expanded the definition of child pornography to cover "any visual depiction, including...any computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means...where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct." ... Ironically, most photographs used to make computer-altered child pornography are not depictions of actual children engaging in any sexually explicit conduct. ... These harms are not present when a sexually explicit image depicting an imaginary child is created solely by computer technology without the use of an actual child participant. ... A strict reading of this statute would even prohibit the use of an adult to portray realistically a minor in sexually explicit material. ...

TEXT:
[*1328]

When confronted with the issue of child pornography, n1 most Americans find no problem with punishing those who create, sell, distribute, or possess visual images of children engaging in sexually explicit conduct. n2 Under normal circumstances, nonobscene, sexually explicit material would possess full First Amendment protection. n3 Actual, living children are used to create child pornography; thus, [*1329] the government's interest in protecting children from sexual abuse is sufficiently compelling to justify a prohibition on nonobscene materials seemingly protected by our Constitution. n4 Until very recently, the sole congressional purpose behind the prohibition of child pornography has been to prevent the harms incurred by children who are used to create these visual materials. n5 The use of children to create even nonobscene pornographic materials has always been deemed a form of sexual abuse that our society refuses to tolerate. n6

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n1. For the purposes of this Note, child pornography is defined as any visual depiction of an actual minor engaging in any actual or simulated, sexually explicit conduct.

n2. See Seth L. Goldstein, The Sexual Exploitation of Children 10-11 (1987).

n3. See Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (applying strict scrutiny to legislation banning sexually explicit material from the internet); Sable Communications v. FCC, 492 U.S. 115, 126 (1989) ("Sexual expression which is indecent but not obscene is protected by the First Amendment ...."); Roth v. United States, 354 U.S. 476, 487 (1957) (emphasis in original) ("The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.").

The First Amendment states, in pertinent part, "Congress shall make no law...abridging the freedom of speech, or of the press ...." U.S. Const. amend. I. Although the First Amendment was originally construed to protect political and social speech, the Court has consistently held that the First Amendment also protects artistic and other types of speech even if of a sexual nature. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981) (holding that nude dancing, as a form of expression, is within the purview of protected free speech); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-02 (1952) (holding that motion pictures, despite being made for commercial motives, are protected by the First Amendment); Winters v. New York, 333 U.S. 507, 510 (1948) (holding that the distinction between informative speech and speech for entertainment purposes is "too elusive" to deny entertaining expression constitutional protection). Most First Amendment scholars have explained that the Court should protect artistic and sexual expression in order to serve the "self-fulfillment" purposes of the First Amendment. See Thomas I. Emerson, The System of Freedom of Expression 6 (1970) (declaring that the purpose of the First Amendment is to enable each individual to realize his or her "character and potentialities as a human being"); Rodney A. Smolla, Free Speech in an Open Society 9 (1992) (claiming that free speech is not only a means to an end but also "an end itself, an end intimately intertwined with human autonomy and dignity"); see also Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting) (expressing the view that "the First Amendment protects important values of individual expression and personal self-fulfillment"); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972) (stating that free speech is necessary "to assure self-fulfillment for each individual").

n4. See, e.g., Osborne v. Ohio, 495 U.S. 103, 108 (1990) (holding that protection of children from sexual abuse is compelling enough to prohibit the possession of child pornography); New York v. Ferber, 458 U.S. 747, 756 (1982) (holding that the protection of "the physical and psychological well-being" of the child was sufficient to justify a prohibition of nonobscene child pornography).

n5. See 136 Cong. Rec. S4729 (daily ed. Apr. 20, 1990) (statement of Sen. Thurmond) ("Protecting our children from the heinous crime of sexual exploitation must be undertaken with strong resolve.... We cannot ignore the harm to these innocent victims as the loss to them and their families is immeasurable.").

n6. See Goldstein, supra note 2, at 10-11.

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As it now stands, most child pornographers require actual children to pose and act in sexually explicit ways in order to create visual images of child pornography. n7 This involvement in the production of child pornography is what Congress has sought to prevent since 1977. n8 Over the past few years, however, computer technology has rapidly advanced, and it is now possible to create life-like images of people. For instance, using a scanner and certain inexpensive software, a computer user can scan a picture of a child onto the com [*1330] puter screen and alter or "morph" the picture to make it appear that the child is nude or engaging in sexually explicit conduct. n9

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n7. See Ronald W. Adelman, The Constitutionality of Congressional Efforts to Ban Computer-Generated Child Pornography: A First Amendment Assessment of S. 1237, 14 J. Marshall J. Computer & Info. L. 483, 484 (1996). Most child pornographers will usually seek out and approach a child who appears vulnerable with the hopes of befriending him or her and developing a close, trusting relationship with the child. See Robert J. Clinton, Note, Child Protection Act of 1984--Enforceable Legislation to Prevent Sexual Abuse of Children, 10 Okla. City U. L. Rev. 121, 132 (1985). After a process of rewarding the child with various gifts, candy, or toys and showing the child various types and degrees of pornography, the pedophile attempts to desensitize the child and make him or her comfortable with the sexual nature of the relationship. See id. at 132-33. Once the offender is satisfied that the child is comfortable and desensitized, the child is persuaded to pose for the offender's photographs or participate in sexual activities with the adult. See id. at 133.

n8. See H.R. Rep. No. 98-536, at 1 (1983), reprinted in 1984 U.S.C.C.A.N. 492. In its report, Congress stated:

The creation and proliferation of child pornography is no less than a national tragedy. Each year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit. The Protection of Children Against Sexual Exploitation Act of 1977 was designed to address this inexcusable abuse of children.

Id.

n9. See David B. Johnson, Comment, Why the Possession of Computer-Generated Child Pornography Can Be Constitutionally Prohibited, 4 Alb. L.J. Sci. & Tech. 311, 313, 314 (1994). This process of "morphing," stemming from the term metamorphosis, has been around for almost a decade and was first utilized to create animation and special effects in various blockbuster films, music videos, and television commercials. See Jeff Prosise, Morphing: Magic on Your PC, PC Mag., June 14, 1994, at 325. Although this computer process is mainly used by the large-scale entertainment industry, ingenious software companies have made this process available for many personal computer users. See id. Once a visual image is transferred into the computer's memory via a scanner, many relatively

inexpensive and easy-to-use software packages can be used to animate the visual image or transform it into a completely different image. See Richard Core, Morphing: It's Not Just for Michael Jackson Anymore, San Diego Bus. J., Feb. 22, 1993, at 1, 24. By combining two highly technical processes called warping and cross-dissolving, the computer enables the user, without much computer skills or knowledge, to animate and transform photographs or other visual images. See Prosise, supra, at 325-27. This morphing process enables computer users to take innocent images of actual children and make them appear as if they are nude or participating in some type of sexual activity. See Johnson, supra, at 313-14. In addition, computer users are able to use this technology in order to scan photographs of adult pornography and transform them into images that appear to be of a child. See Debra D. Burke, The Criminalization of Virtual Child Pornography: A Constitutional Question, 34 Harv. J. on Legis. 439, 440-41 (1997).

Most of these software packages are relatively inexpensive, very easy to install and apply, and can be used on most personal computers. See Johnson, supra, at 314. Programs such as Gryphon Software Corporation's "Morph" and Black Belt System's "WinImages Release 3.1," are available for under $ 100 and provide computer users with technologically advanced special-effects and morphing capabilities. See Core, supra, at 1, 24. Although these programs do not provide home users with the graphic and morphing capabilities used by the entertainment industry, the technology is rapidly advancing and most programs can produce images of "photo-realistic quality." See Johnson, supra, at 314.

For purposes of this Note, material created by the previously discussed process will be called computer altered or morphed images. This type of material, which has been prohibited by recent changes to the federal child pornography statute, may still be harmful to children if the photographs used to create the images are of actual, identifiable minors. Therefore, under the Supreme Court's holdings in both New York v. Ferber, 458 U.S 747 (1982) and Osborne v. Ohio, 495 U.S. 103 (1990), because actual children are the basis of these images, there are no constitutional problems with prohibiting the possession and creation of this type of material. See infra notes 67-74 and accompanying text for a more detailed discussion.

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In addition, computer users can create realistic, three-dimensional animated images of humans that are merely figments of the user's imagination without even scanning photographs of actual people. n10 At the present time, the components necessary to create [*1331] these images are quite expensive and the images and animation produced are easily distinguishable from actual persons and movements. n11 Many experts believe, however, that within a few years, due to the rapid advancement of computer technology, these computer-generated images will be impossible to distinguish from actual photographs. Additionally, industry insiders speculate that the requisite software and hardware will soon be inexpensive enough to be used on personal home computers. n12

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n10. See Kathleen K. Weigner & Julie Schlax, But Can She Act?, Forbes, Dec. 10, 1990, at 274. These computer-generated three-dimensional images are created by a relatively new computer imaging process. See id. The computer programmer, using a clay or human model, can digitize the model into the computer using

video-type computer hardware. See id. at 278. Then, using technologically advanced computer software, the individual can develop the computer image into a human-like image. See id.; Diana Phillips Mahoney, Face Tracking, Computer Graphics World, Apr. 1997, at 23, 24 (discussing how computer animators are now even capable of recreating human facial expressions using facial motion capture systems). The computer user may also animate the computer-generated image by applying software that utilizes what is known as motion capturing systems. See id. at 24. During this process, retroreflective markers are placed in certain places on a motion actor. See id. The markers are then illuminated by lasers to produce reflected lights that are picked up by a digital video camera and transferred into the computer. See id. The computer then analyzes and calculates the movements and records them into memory. See id. The software then enables the computer user to apply the recorded motions to realistically animate computer-generated human-like images. See id.

This technology, at the present time, is very expensive and the images and animation produced do not appear entirely realistic. See Weigner & Schlax, supra, at 276 (discussing the entertainment industry's use of this technology to create synthetic actors for blockbuster motion pictures). Most computer experts estimate, however, that it will only be a few years before the technology is inexpensive enough to be used by personal computer users and advanced enough to create images and animation that will appear entirely humanistic. See id. at 274; see also Donna Coco, Creating Humans for Games, Computer Graphics World, Oct. 1997, at 26 (discussing the problems software developers face in trying to create realistic-looking humans via computer generation and animation). For purposes of this Note, materials created pursuant to this previously discussed process will be referred to as computer-generated images.

n11. See Johnson, supra note 9, at 315-16.

n12. See Philip Elmer-Dewitt, Through the 3-D Looking Glass, Time, May 1, 1989, at 65.

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No actual children are involved or used in the creation of these computer-generated images; thus the production and possession of such material causes no direct harm to any child. As this Note will demonstrate, Congress's recent prohibition on computer-generated child pornography is a clear and blatant violation of our First Amendment principles. n13 Although Congress has consistently broadened the scope of its attack on child pornography, the Court has upheld this expansion because of the underlying sexual abuse involved. n14 The courts have consistently explained that the government's only compelling and permissible justification for prohibiting [*1332] child pornography is to prevent the harms associated with participating in the production of such material. n15 This recent legislative amendment does not serve or advance this sole compelling interest. The ban on computer-generated sexual material is therefore an unconstitutional violation of free expression.

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n13. See infra notes 76-81 and accompanying text for a discussion of the constitutional implications of the new statutory changes.

n14. See, e.g., New York v. Ferber, 459 U.S. 747, 764 (1982).

n15. See infra notes 81-125 and accompanying text.

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History of Congress's Attack on Child Pornography

Throughout the 1970s, the public grew concerned over rampant stories of child abuse, child prostitution rings, and the increased production and availability of child pornography. n16 Congressional committees blamed these increased incidents on the federal government's failure to pass legislation that directly prohibited the production, sale, or distribution of child pornography. n17 In response, Congress investigated the child pornography industry and determined that the existing federal laws did not adequately protect children from the harms associated with the creation of child pornography. n18 After numerous debates over the language to be employed, Congress passed the first federal child pornography statute in 1977. n19

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n16. See Annemarie J. Mazzone, Comment, United States v. Knox: Protecting Children From Sexual Exploitation Through the Federal Child Pornography Laws, 5 Fordham Intell. Prop. Media & Ent. L.J. 167, 174 (1994).

n17. See S. Rep. No. 95-438, at 9, 10 (1977), reprinted in 1978 U.S.C.C.A.N. 47. Up until this time, prosecutors throughout the country had been relying on obscenity and sexual abuse statutes to punish instances of child pornography and sexual exploitation. See id.; Mazzone, supra note 16, at 174.

n18. See Todd J. Weiss, The Child Pornography Act of 1984: Child Pornography and the First Amendment, 9 Seton Hall Legis. J., 327, 333 (1985). Based on its investigation, Congress concluded that child pornography had grown into a nationwide, multimillion dollar enterprise and that the children used to produce such material were being subjected to harmful effects. See S. Rep. No. 95-438, at 5 (1977), reprinted in 1978 U.S.C.C.A.N. 42-43. The Senate's report concluded that child pornography was physically and emotionally harmful to the child participants because it endangered their ability to develop normal, affectionate relationships and caused them to turn to drugs, prostitution, and molestation as adults. See id. at 9, reprinted in 1978 U.S.C.C.A.N. 46.

n19. See 18 U.S.C. 2251-2253 (West Supp. II 1979) (1977 Act); Mazzone, supra note 16, at 176 (discussing congressional debates about potential child-protective legislation). The first provision of this new legislation criminalized the use of children, under the age of 16, to create or produce a visual or print medium involving sexually explicit conduct. See 18 U.S.C. 2251(a), 2253(1) (West Supp. II 1979). This provision only applied to material known to have been transported by the mails or interstate commerce. See 18 U.S.C. 2251(a), 2252(a)(2) (West Supp. II 1979). This section stems from Congress' limited ability to legislate under the Commerce Clause. See U.S. Const. art. I, 8 ("Congress shall have power...to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

More importantly, however, Congress also made it a crime to transport or receive, for a commercial purpose, through the mails or interstate commerce,

any obscene visual or print material involving "the use of a minor engaging in sexually explicit conduct." 18 U.S.C. 2252(a) (West Supp. II 1979). A "minor" was defined as a child under the age of 16. See id. "Sexually explicit conduct" included actual or simulated "lewd" poses or acts. See 18 U.S.C. 2253(1) (West Supp. II 1979). Due to the Supreme Court's holding in Miller v. California, 413 U.S. 15 (1973), Congress believed that it could only prohibit child pornography that fit within the Miller standard for obscenity. See S. Rep. No. 95-438, at 11-13 (1977), reprinted in 1978 U.S.C.C.A.N. 49-50. Under the Miller standard for obscenity, a work is only deemed to be obscene if

(a) [] "the average person applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (b) [] the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) [] the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Miller, 413 U.S. at 24. Moreover, the Court held that materials not defined as obscene retained full First Amendment protection. See id. at 27; see also Roth v. United States, 354 U.S. 476, 487 (1957).

In addition, these provisions required prosecutors to prove that the defendant had an intent to sell the child pornography. See 18 U.S.C. 2252(a) (West Supp. II 1979). These provisions did not prohibit the noncommercial distribution of child pornography. See Weiss, supra note 18, at 335.

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[*1333] For various reasons, this statute proved to be unsuccessful at reducing the amount of child pornography on the market. n20 Despite the failures of the 1977 Act, many states began enacting laws prohibiting the intrastate production, distribution, and receipt of child pornography. n21 Although some states followed Congress's lead in legislating only child pornography that satisfied the Miller v. California definition of obscenity, many states took a more aggressive step and enacted statutes prohibiting even nonobscene child pornography. n22 For example, New York prohibited the distribution of nonobscene child pornography. n23 Reviewing that New York statute, the Su [*1334] preme Court in 1982 made its first decision regarding the constitutionality of laws dealing with the production and distribution of nonobscene child pornography.

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n20. See Clinton, supra note 7, at 128-29; Mazzone, supra note 16, at 182. Over the first six years, despite the increases in incidents of child sexual exploitation, less than 30 people were convicted for violating either of these federal provisions. See H.R. Rep. No. 98-536, at 2 (1983), reprinted in 1984 U.S.C.C.A.N. 493.

n21. See Weiss, supra note 18, at 337.

n22. See id. By 1982, 20 states had criminalized both the distribution and receipt of nonobscene, sexually explicit depictions of children. See New York v. Ferber, 458 U.S. 747, 749 & n.2 (1982). These statutes did not require that the material appeal to the prurient interest and did not provide an exception for

material containing serious literary, scientific, educational, or political value. See Weiss, supra note 18, at 338.

n23. See N.Y. Penal Law 263.15 (McKinney 1989); Weiss, supra note 18, at 337-38. The New York statute prohibited the production of material that contained sexual conduct "by a child less than 16 years old." N.Y. Penal Law 263.15. The statute failed to define sexual conduct in accordance with the Supreme Court's standard of obscenity. See N.Y. Penal Law 263.00(3) (McKinney 1989).

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New York v. Ferber: Nonobscene Child Pornography is Not Protected by the First Amendment.

In New York v. Ferber, n24 New York convicted the defendant of selling child pornography to an undercover police officer. n25 Based on Miller, Mr. Ferber challenged the law as a violation of the First Amendment. n26 Although the New York Court of Appeals found the statute unconstitutional, n27 an unanimous Supreme Court reversed, holding that the state could, consistent with First Amendment principles, prohibit the sale, dissemination, and distribution of nonobscene child pornography. n28 Even after recognizing the constitutional concerns presented by such statutes, the Court determined that the state had a compelling interest in protecting children from the effects of being used to create child pornography. n29 As a result, non [*1335] obscene visual depictions of children engaging in sexual conduct retained no First Amendment protection.

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n24. 458 U.S. 747 (1982).

n25. See id. at 752.

n26. See id.

n27. See People v. Ferber, 422 N.E.2d 523, 526 (N.Y. 1981).

n28. See Ferber, 458 U.S. at 774. The Court did not determine whether mere possession of child pornography could be constitutionally prohibited. See John Quigley, Child Pornography and the Right to Privacy, 43 Fla. L. Rev. 347, 351 (1991) (claiming that the Court avoided this issue because the New York statute did not explicitly prohibit mere possession).

n29. See Ferber, 458 U.S. at 764. Initially, the Court determined that the state had a compelling interest in protecting the physical and psychological well-being of children. See id. at 756-57. Based on legislative findings, the Court concluded that the production of child pornography physiologically, mentally, and emotionally harms the children employed as subjects for the creation of such material. See id. at 758; S. Rep. No. 95-438, at 5, 9 (1977), reprinted in 1978 U.S.C.C.A.N. 43, 46. Experts have concluded that involvement in the creation of child pornography caused children to incur many problems later in life including: sexual disfunctions, problems with affection, sexual abuse of others, drug and alcohol addictions, and prostitution. See Ferber, 458 U.S. at 758 n.9. The Court also determined that the Miller test bore no

relation to whether the children involved in producing child pornography suffered these harms. See id. at 761.

In addition, Justice White, writing for the Court, reasoned that the distribution of child pornography was inextricably correlated with the sexual abuse of children. See id. at 759. Because child pornography created a "permanent record" of that child's victimization, distribution and circulation of such depictions exacerbated the harm incurred by the child. See id. The Court also reasoned that the child had some privacy interest not to have his picture circulated among the pedophilic subculture. See id. at 759 n.10. More importantly however, the Justices agreed with the legislatures in most states that the production of child pornography could not be effectively controlled by merely investigating and prosecuting the producers of child pornography. See id. at 759-60. The Court opined that in order to adequately reduce the amount of child pornography being produced, and thus the amount of children being sexually abused, it was necessary "to dry up the market" for such material by criminalizing its sale and distribution. See id. at 760.

Moreover, the Court described the social value in the dissemination of child pornography as "exceedingly modest, if not de minimis." Id. at 762. But see FCC v. Pacifica Found., 438 U.S. 726, 745-46 (1978) (stating that the First Amendment protections given to speech do not depend on its offensiveness, content, or social value). Justice White reasoned that if a depiction of a child engaging in lewd conduct was necessary for a serious literary, scientific, or educational work, an artist could use alternative means of creating this depiction without actually using a minor. See Ferber, 458 U.S. at 762-63. The Court proffered that an artist could use a young looking adult or some other means of simulation to achieve the depiction of a child. See id. Finally, the Court held that when the government's interest in restricting speech "overwhelmingly outweighs the expressive interests" involved, such material may be deemed to be without First Amendment protection. See id. at 763-64.

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Although Ferber held child pornography to be unprotected speech under the First Amendment, limits were put on the government's ability to proscribe such material. n30 Most pertinent to the area of computer-generated imaging, the Court stated: "We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." n31

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n30. See Ferber, 458 U.S. at 764 ("As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.").

n31. Id. at 764-65.

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In light of Ferber, and because the 1977 Act proved to be quite ineffective, Congress re-opened its investigation into the child pornography industry in 1982. n32 After two years of research and debate and several proposed

amendments, Congress passed the Child Protection Act of 1984 (1984 Act) n33 as an amendment to the 1977 Act. n34 This new amendment made several important changes.

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n32. See Weiss, supra note 18, at 342.

n33. 18 U.S.C. 2251-2256 (West Supp. III 1986).

n34. See Mazzone, supra note 16, at 185-86.

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Initially, the 1984 Act changed the definition of minor to include all children under age eighteen. n35 Due to the Supreme Court's holding in Ferber, Congress also dropped the obscenity requirement in the prohibition provision of the receipt and transportation section of the child pornography statute. n36 In addition, the 1984 Act re [*1336] moved the commercial purpose requirement of the 1977 Act. n37 Congress also decided that the original prohibition against nonobscene print material depicting child pornography was most likely unconstitutional. n38

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n35. See 18 U.S.C. 2256(1) (West Supp. III 1986).

n36. See H.R. Rep. No. 98-536, at 2, 5, 7 (1983), reprinted in 1984 U.S.C.C.A.N. 492-93, 496, 498. The 1984 amendment only required that the material in question be "sexually explicit." See 18 U.S.C. 2252(a)(2)(A) (West Supp. III 1986).

n37. See H.R. Rep. No. 98-536, at 7 (1983), reprinted in 1984 U.S.C.C.A.N. 498. Because child pornography tended to be "home-made," for personal use, and was usually traded or given away without monetary exchange, the commercial purpose requirement of the 1977 Act made it very difficult to prosecute these offenders. See Weiss, supra note 18, at 344. Several cases upheld this change in the law and have applied it broadly. See United States v. Andersson, 803 F.2d 903, 907 (7th Cir. 1986) (holding that 18 U.S.C. 2252 prohibits even purely private transfers or exchanges of child pornography); United States v. Miller, 776 F.2d 978, 979-80 (11th Cir. 1985) (holding that the defendant could be convicted for receiving material even if the state did not show that he had an intention to distribute it).

n38. See H.R. Rep. No. 98-536, at 3, 7 (1983), reprinted in 1984 U.S.C.C.A.N. 494, 498. Because the creation of these print materials did not involve the use of children, Congress felt that it could not criminalize such material under the reasoning in Ferber without a finding of obscenity. See id. These changes in the federal government's attempt to eradicate sexual abuse and child pornography proved to be much more effective. See Susan G. Caughlan, Note, Private Possession of Child Pornography: The Tensions Between Stanley v. Georgia and New York v. Ferber, 29 Wm. & Mary L. Rev. 187, 199-200 (1987) (discussing how the changes in the 1984 Act increased prosecutions under the federal statute and helped reduce the flow of child pornography). Congress' power to regulate child pornography was limited, however, by its powers under the Commerce Clause

because the 1984 Act only reached child pornography that traveled or was meant to travel across state lines. See Mazzone, supra note 16, at 187. In 1990, however, Congress made another amendment to the 1977 Act that prohibited the knowing possession of child pornography, but only if the depictions were sent by mail or interstate commerce or were produced with materials that were mailed or shipped in interstate commerce. See 18 U.S.C. 2252(a)(4)(B) (West Supp. II 1991).

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Stanley v. Georgia: First Amendment Right to Possess Obscene Materials

After a thorough investigation of the child pornography industry, the Attorney General recommended that states pass legislation that prohibited the private possession of child pornography. n39 As several states began passing and enforcing these statutes, defendants started challenging these laws as inconsistent with Stanley v. Georgia. n40

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n39. See Attorney Gen. Comm. on Pornography, U.S. Dep't of Justice, Final Report 648-49 (1986). By 1990, 19 states had banned the mere possession of child pornography in the home. See Mazzone, supra note 16, at 188.

n40. 394 U.S. 557 (1969); see also Mazzone, supra note 16, at 188 (noting that commentators suggested that the criminalization of possession of child pornography violated the right to privacy).

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In Stanley, the state convicted the defendant under a statute that criminalized the possession of obscene material in the privacy of his [*1337] own home. n41 The Supreme Court held that a prohibition of the mere private possession of obscene material violated the First Amendment's guarantee of "free thought and expression." n42 Although the government could criminalize the distribution or sale of obscene material, the Supreme Court held that a person's right to view and read material in the privacy of his own home, regardless of its social value, was a fundamental guarantee protected by our Constitution. n43

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n41. See Stanley, 394 U.S. at 558-59.

n42. See id. at 568.

n43. See id. at 563-65. The Court stated:

"The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual."

Id. at 562 n.7 (quoting State v. Mapp, 166 N.E.2d 387, 393 (Ohio 1960)).

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The Court's holding was grounded in a mixture of First Amendment principles and privacy rights guaranteed by the Fourth Amendment. n44 In a footnote at the conclusion of his opinion, Justice Marshall stated, "Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials." n45 Thus, until 1990 the government could not outlaw the mere private possession of sexually explicit material, regardless of whether it fell within the Miller standard. n46

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n44. See id. at 564-65.

n45. Id. at 568 n.11.

n46. See Osborne v. Ohio, 495 U.S. 103, 108 (1990). Although the Stanley Court recognized a constitutional right to possess obscene material, the Supreme Court has held this does not create correlative rights to receive or distribute such material. See United States v. Orito, 413 U.S. 139, 143 (1973) (holding that Stanley cannot be extended to include a correlative right to receive, transport, or distribute obscene material); United States v. 12 200-Ft. Reels of Super 8MM Film, 413 U.S. 123, 128 (1973) (holding that the government may, consistent with Stanley, prohibit the foreign importation of obscene material); United States v. Reidel, 402 U.S. 351, 356 (1971) (holding that Stanley did not affect the government's power to prohibit the use of the mail to distribute obscene materials); see also Bowers v. Hardwick, 478 U.S. 186, 195 (1986) (holding that Stanley could not be extended to prohibit the government from banning homosexual sodomy even if it occurs in the privacy of one's home). Although many commentators have questioned whether the Bowers Court effectively overruled and discarded the Stanley holding, Bowers did not implicate First Amendment interests as Stanley did. See id. (stating that Stanley was "firmly grounded in the First Amendment"); see also Claudia Tuchman, Note, Does Privacy Have Four Walls? Salvaging Stanley v. Georgia, 94 Colum. L. Rev. 2267, 2286-87 (1994) (distinguishing Bowers from Stanley by describing Bowers as a rejection of sexual privacy rights for homosexuals); Brett J. Williamson, Note, The Constitutional Privacy Doctrine After Bowers v. Hardwick: Rethinking the Second Death of Substantive Due Process, 62 S. Cal. L. Rev. 1297, 1299-1301 (1989) (discussing the Bowers decision as the Court's rejection of substantive due process protection for sexual privacy).

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[*1338]

Osborne v. Ohio: An Exception for Child Pornography

As states began prosecuting citizens for merely possessing or viewing child pornography in their homes, defendants unsuccessfully argued that the prosecutions violated their First Amendment rights enunciated in Stanley. n47 The Court finally resolved the issue in Osborne v. Ohio. n48 In Osborne, the state convicted the defendant of possessing several pictures of child

pornography in his home. n49 The defendant challenged his conviction based on Stanley, arguing that Ohio's law violated his First Amendment right to possess and view obscene materials in the privacy of his home. n50 Although the Court did not overrule Stanley, Justice White held that Ohio's interest in preventing the sexual abuse of children justified such an intrusion on First Amendment rights. n51

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n47. See Mazzone, supra note 16, at 188. See, e.g., Ex Parte Felton, 526 So. 2d 638 (Ala. 1988) (holding that Stanley does not control the state's ability to prohibit the possession of child pornography); State v. Beckman, 547 So. 2d 210 (Fla. Dist. Ct. App. 1989) (holding that the defendant's conviction for possessing child pornography did not violate his First Amendment rights); People v. Geever, 522 N.E.2d 1200 (Ill. 1988) (rejecting a constitutional challenge to a statute criminalizing the possession of child pornography); State v. Young, 525 N.E.2d 1363 (Ohio 1988) (holding that the state's prohibition on the possession of child pornography was constitutionally valid); State v. Meadows, 503 N.E.2d 697 (Ohio 1986) (rejecting the argument that Stanley prevents the government from prohibiting the possession of child pornography); Savery v. State, 767 S.W.2d 242 (Tex. Ct. App. 1989) (upholding the state's child pornography statute against a First Amendment attack).

n48. 495 U.S. 103 (1990).

n49. See Osborne, 495 U.S. at 107.

n50. See id. at 108.

n51. See id. ("We nonetheless find this case distinct from Stanley because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley.").

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Justice White reasoned that, because the prohibition on the distribution of child pornography passed constitutional muster, the criminalization of possession of child pornography must also be permissible. n52 Although the Stanley Court rejected a similar argument as it related to obscene materials, the Osborne Court relied on the final footnote in Stanley to justify such a departure. n53 Based on [*1339] the limitations created by Stanley and Ferber, the Osborne Court held that states could prohibit the mere possession of child pornography, provided their purpose was to protect children from the harms caused by the production of child pornography and not to regulate people's thoughts and expressions. n54

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n52. See id. at 109-10 ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain.").

n53. See id. at 110; Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969). In addition, relying on the 1986 Attorney General's Report on Pornography, the majority concluded that "pedophiles use child pornography to seduce other

children into sexual activity." Osborne, 495 U.S. at 111. The Attorney General's Final Report stated:

Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having "fun" participating in the activity.

Attorney Gen. Comm. on Pornography, U.S. Dep't of Justice, Final Report 649 (1986) (footnotes omitted).

n54. See Osborne, 495 U.S. at 109. The Osborne Court noted that the Ohio scheme differed from the Georgia scheme in Stanley because "the State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children." Id. Immediately after Osborne, Congress initiated legislation that prohibited the mere possession of child pornography. See 136 Cong. Rec. S4729-30 (daily ed. Apr. 20, 1990) (statement of Sen. Thurmond). This bill was passed into law in 1990; however, because of Congress' limits under the Commerce Clause, the provision only prohibits possession of child pornography that was mailed or shipped by interstate commerce or was created with materials that were mailed or shipped in interstate commerce. See 18 U.S.C. 2252(a)(4) (West Supp. II 1991).

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This trilogy of cases seems to create a clear set of principles regarding First Amendment rights as they relate to sexually explicit expression. Although the government can prohibit the sale and distribution of obscene materials, it cannot punish citizens for merely viewing or possessing obscene materials in the privacy of their own homes. n55 When the sexually explicit material contains depictions of children, however, the government may prohibit the production, sale, distribution, and possession of such material, whether it is legally obscene or not. n56 Even though the government may prohibit such nonobscene material, its authority is limited to visual depictions that are made using actual children under the age of majority. n57 In addition, the government may only prohibit the possession of child pornography in an effort to protect children from the harms resulting from their participation in the production of such material. n58

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n55. See Stanley, 394 U.S. at 568 (noting that "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.").

n56. See Osborne, 495 U.S. at 111; New York v. Ferber, 458 U.S. 747, 774 (1982).

n57. See United States v. X-Citement Video, Inc., 513 U.S. 64, 78 (1994) (holding that the First Amendment requires that the federal child pornography statute contain a scienter requirement showing that the offender knew the participant in the visual material was underage).

n58. See Ferber, 458 U.S. at 764.

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[*1340]

1996 Amendment: Prohibiting Visual Images that Appear to be of a Minor

In 1995 Congress proposed a bill that seems to conflict with these basic principles laid out by the Supreme Court. The proposed bill, n59 sponsored by Senator Hatch, made several changes to Congress's attack on child pornography. Most pertinent, the Hatch Amendment expanded the definition of child pornography to cover "any visual depiction, including...any computer or computer-generated image or picture, whether made or produced by electronic, mechanical or other means...where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct." n60 Through this proposal, Congress has tried to address the new technological advances in computer imaging software that enable users to create realistic looking images of people, including children. n61 Officials endorsing this new legislation believe that these computer capabilities, if possessed and utilized by pedophiles and other child abusers, would hinder the government's ability to prosecute child pornographers and protect children from sexual abuse and molestation. n62

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n59. See S. Rep. No. 104-358, at 1 (1996). The bill, labeled S. 1237, was introduced to Congress by Senator Hatch on August 27, 1996. See id.

n60. 18 U.S.C.A. 2256 (8)(B) (West Supp. 1998). In addition, this proposed legislation has made it a crime to knowingly mail, ship, or distribute by interstate commerce, including by computer, any child pornography as defined by the previously stated provision. See 18 U.S.C.A. 2252A (West Supp. 1998). This provision has also prohibited the possession of three or more visual images of child pornography, if they were mailed or shipped in interstate commerce or were produced using materials that were mailed or transported in interstate commerce. See 18 U.S.C.A. 2252A(a)(5)(B) (West Supp. 1998).

n61. See S. Rep. No. 104-358, at 7 (1996). The report stated:

This legislation is needed due to technological advances in the recording, creation, alteration, production, reproduction, distribution and transmission of visual images and depictions, particularly through the use of computers. Such technology has made possible the production of visual depictions that appear to be of minors engaging in sexually explicit conduct which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct.

Id.

n62. See id. at 2. In his report to the Senate, Senator Hatch explained that computer-generated child pornography, which is created without the use of an actual child, posed a few possible threats to the physical and psychological well-being of children. See id. at 7. For instance, Congress felt that

pedophiles used this material to foster and encourage their activities of child abuse and to "feed their sexual fantasies." Id. at 12. Also, Senator Hatch's report explained that because computers could create realistic images, not prohibiting computer-generated child pornography would make it more difficult for prosecutors to prove that other prohibited child pornography was made with the use of actual children. See id. at 16-17.

Finally, Congress reasoned that because of the material's realistic nature, pedophiles and other child abusers could use computer-generated child pornography "to seduce or blackmail the child into submitting to sexual abuse or exploitation." Id. at 16. For these reasons, endorsers of this bill believed that the purposes behind this legislation was compelling enough to satisfy any level of constitutional scrutiny. See id. at 20-21. Specifically, Senator Hatch explained that Ferber and Osborne held that all sexually explicit images depicting children are without First Amendment protection, especially in light of the compelling interest in protecting children from future sexual abuse and molestation. See id.

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[*1341] Although the goal of protecting children is compelling, a few members of Congress disagreed with the constitutional validity of these proposed amendments to the federal child pornography statutes. n63 Specifically, both Senators Biden and Feingold voiced their opposition to the Hatch Amendment because they felt it conflicted with the Supreme Court's holdings in Osborne and Ferber. n64 The senators expressed concern that the proposed changes were not aimed at protecting children from the harms associated with their participation in child pornography but rather bordered on censorship. n65 Despite this opposition, Congress enacted the Hatch Amendment to the 1977 Act on September 30, 1996. n66

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n63. See id. at 36-38. A few officials felt that the new changes would be a violation of First Amendment rights. See id. (highlighting the views of Senators Biden and Feingold). In addition, Senators Kennedy and Simon expressed their opposition to the bill because it implemented mandatory minimum sentencing. See id. at 33-35.

As amended, 18 U.S.C.A. 2251(d) requires a mandatory sentence of 10 years imprisonment for persons convicted of sexually exploiting a minor. See 18 U.S.C.A. 2251(d) (West Supp. 1998). Under 18 U.S.C.A. 2252(b)(1), previously convicted offenders who receive or distribute child pornography must be sentenced to at least five years in prison. See 18 U.S.C.A. 2252(b)(1) (West Supp. 1998). Defendants who have been previously convicted of a child pornography offense and are convicted of possessing three or more articles of child pornography must be sentenced to at least two years in prison. See 18 U.S.C.A. 2252(b)(2) (West Supp. 1998).

n64. See S. Rep. No. 104-358, at 29, 37 (1996).

n65. See id.

n66. See 18 U.S.C.A. 2251-2258 (West Supp. 1998).

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Congress May Outlaw Sexually Explicit Images of an "Actual, Identifiable Minor"

Although Congress rejected Senator Biden's concerns about the constitutionality of a prohibition of computer-generated child pornography, an amendment was adopted that outlaws sexually explicit images created by the computer alteration or morphing of visual materials depicting actual children. n67 This provision provides an alter [*1342] native definition of child pornography in the event that the clause that prohibits computer-generated images created without the use of an actual minor is struck down as unconstitutional. n68

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n67. See 18 U.S.C.A. 2256. Under the statute child pornography means "any visual depiction, including any...computer or computer-generated image or picture,...where such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct." Id. Under the statute an identifiable minor is one "who was a minor at the time the visual depiction was created, adapted, or modified or whose image as a minor was used in creating, adapting, or modifying the visual depiction; and who is recognizable as an actual person by the person's face, likeness or other distinguishing characteristic." Id.

n68. See S. Rep. No. 104-358, at 31 (1996). Congress added a severability clause to the amendment in case Senator Hatch's definition of child pornography was held to be impermissible. See 18 U.S.C.A. 2252A(a)(5)(B) (West Supp. 1998).

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Unlike Senator Hatch's definition, the alternative clause only prohibits child pornography created by the computer alteration or morphing of visual images produced by using a person that could be identified as an actual child. n69 Together, these two additions to the definition of child pornography have made it a federal crime knowingly to create, possess, sell, or distribute nonobscene, sexually explicit images that appear to depict a child, regardless of whether the image actually involves a living child. n70

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n69. In many cases, innocent pictures of actual, live children would be scanned onto a computer screen and altered or morphed by software to create a visual image of a nude child or one engaging in sexually explicit conduct. See supra note 9 and accompanying text. This is quite different than visual images that are completely generated by a computer without the use of a child or a photograph of a child, because an actual, identifiable child is the basis for the sexually explicit image. See Johnson, supra note 9, at 314-15.

n70. See 18 U.S.C.A. 2252, 2256 (West Supp. 1998).

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Under the Court's holdings in both Ferber and Osborne, Congress may prohibit the creation, distribution, and possession of visual images that are created

using a photograph of an actual, identifiable child. Although the photographs used are often innocent pictures involving no depiction of the child engaging in lewd or lascivious conduct, this material cannot be created without sexually exploiting the image of an actual, identifiable minor. n71

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n71. See supra note 9 and accompanying text for a discussion of the morphing process.

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In Ferber, the Court justified the prohibition of child pornography because "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." n72 This language implies that Congress is permitted to prevent actual children from being the subject of sexually explicit images. Ironically, most photographs used to make computer-altered child pornography are not depictions of actual children engaging in [*1343] any sexually explicit conduct. In fact, many of the children whose live images are used to produce sexually explicit images are unaware that their photographic images are being altered or morphed. n73

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n72. New York v. Ferber, 458 U.S. 747, 759 (1982).

n73. See supra note 9 and accompanying text.

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The Ferber Court also reasoned that children are harmed because their participation in a sexual act has been permanently recorded. n74 Although this computer-altered visual image may be created without an actual child participating in a sexual act or pose, this should not end the inquiry. n75 Such material still requires the exploitation of an actual child's identity and image for sexually explicit purposes and should be deemed an invasion of that child's privacy rights. n76 In Ferber, Justice White implied that the production and distribution of a child's image for sexually explicit purposes constitutes an invasion of that child's privacy interests. n77 Therefore, even though no actual child has been abused to create the sexually explicit image, an actual child's identity and image has been exploited for sexual and commercial purposes. Congress, and the states as well, should be permitted to protect children by preventing their identity and features from being sexually exploited. n78

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n74. See Ferber, 458 U.S. at 759 & n.10.

n75. See Adelman, supra note 7, at 484 n.13 (arguing that prohibiting sexually explicit computer alterations of photographs of actual children would not violate the First Amendment).

n76. See id.

n77. See Ferber, 458 U.S. at 758 n.9 ("When such performances are recorded and distributed, the child's privacy interests are also invaded."); see also United States v. Wiegand, 812 F.2d 1239, 1245 (9th Cir. 1987) (explaining that the child's "human dignity" is offended when he is used as a subject for child pornography). This dignity is equally offended when a real child's identity or image is used to create sexually explicit images by computer. See Prison-Computer List Centers on Information About Children, Orange County Register, Nov. 20, 1996, at A21 (discussing a convicted sex offender who used photographs of children from community newspapers to compile a catalog of 3000 children on his computer apparently intended to be distributed to other pedophiles).

n78. See Ferber, 458 U.S. at 759 n.10 (suggesting that child "pornography may haunt [the exploited child] in future years"); Adelman, supra note 7, at 484 n.13.

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Congress May Not Ban Nonobscene, Sexually Explicit Images that Do Not Depict an Actual, Identifiable Child

It is not so clear, however, whether the government can constitutionally prohibit people from creating, possessing, and even disseminating computer-generated images of child pornography that are created without the use of an actual, identifiable minor. Obviously, if the material is obscene under the Miller standard, Congress [*1344] may prohibit its dissemination and receipt regardless of whether the material depicts children. n79 Even if material is declared obscene under Stanley, however, the government should not be able to punish people for merely possessing child pornography created solely by computer software and the user's imagination. Moreover, if this type of material is deemed not to be obscene, then it should possess full constitutional protection. n80 In order to survive constitutional scru [*1345] tiny, the new amendment to the child pornography laws must be the least restrictive means of achieving a compelling governmental interest. n81

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n79. See Miller v. California, 413 U.S. 15, 23-24 (1973).

n80. Under the Supreme Court's First Amendment jurisprudence, any government regulation restricting the freedom of speech must be scrutinized under one of two standards of analysis. See Laurence H. Tribe, American Constitutional Law 12-2, at 582 (1978). In determining which analysis to apply to a given statute, the Court must first determine if the restriction on speech is content-based or content-neutral. See Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113, 113, 114 (1981). If the government's purpose is to suppress speech because of the communicative impact of the expression, then the statute is content-based and presumptively invalid unless the speech itself falls within a category of unprotected speech, such as obscenity, or the statute satisfies strict scrutiny. See Tribe, supra, at 582. Under the Court's strict scrutiny standard of review, the statute must be narrowly drawn to serve a compelling state interest. See Roe v. Wade, 410 U.S. 113, 155 (1973) (stressing that governmental restrictions on fundamental rights must be subjected to this stringent standard of judicial review).

If the challenged regulation is content-neutral, not aimed at restricting the speech because of its message, then the statute will be scrutinized under a track two standard of analysis. See Tribe, supra, at 582. Under this more relaxed standard of review, usually reserved for content-neutral time, place, and manner restrictions, the government's provision is valid if it serves an important governmental interest, is not aimed at the content of the speech, and leaves open other channels of communication. See, e.g., Kovacs v. Cooper, 336 U.S. 77, 88-89 (1949) (upholding an ordinance forbidding the use of sound trucks for any expressive purpose). See James R. Branit, Reconciling Free Speech and Equality: What Justifies Censorship?, 9 Harv. J.L. & Pub. Pol'y 429, 436-37 (1986) (contending that this track two standard of analysis should not be applied to restrictions on sexual material). Because the material proscribed under the new child pornography statute covers some material that does not fall within any category of traditionally unprotected speech and because the statute is clearly a content-based restriction, the statute is presumptively unconstitutional unless it survives strict scrutiny. See Reno v. ACLU, 117 S. Ct. 2329, 2346 (1997) (applying a heightened degree of scrutiny to legislation prohibiting the transmission of sexual material over the internet); Sable Communications, Inc. v. FCC, 492 U.S. 115, 126 (1989) (applying strict scrutiny to a statute banning indecent phone messages).

The 1996 amendment has been recently challenged by a trade association, several artists, and book publishers on First Amendment grounds. See The Free Speech Coalition v. Reno, No. C 97-0281VSC, 1997 WL 487758, at *1 (N.D. Cal. Aug. 12, 1997). Specifically, the plaintiffs in Free Speech Coalition argued that the statute outlawed legitimate artistic materials that do not constitute child pornography and have always been deemed protected by the First Amendment. See id. at *2. In rejecting the plaintiffs' contentions, the district court upheld the new amendment as a valid content-neutral restriction because it was aimed at preventing the secondary effects of child pornography including its effect on society, its effect on viewers, and its potential to be used to lure child victims. See id. at *4. Relying on the Court's secondary effects theory as enunciated in Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) and Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the district court concluded that because the statute is aimed at curbing these secondary effects it is content-neutral and subject to less than strict First Amendment scrutiny. See Free Speech Coalition, 1997 WL 487758, at *4.

Although the Court relied on the secondary effects theory in Renton and Young, the legislation upheld in those cases were zoning regulations that only prohibited adult theaters in certain parts of the city. See Renton, 475 U.S. at 46; Young, 427 U.S. at 52. The Court specifically explained that because the regulations did not ban adult theaters altogether, they were valid time, place, and manner restrictions that are reviewed under intermediate scrutiny. See Renton, 475 U.S. at 46, 50; Young, 427 U.S. at 62. The Court went on to rely on its secondary effects theory because the time, place, and manner regulations were only directed at certain theaters based on the content of the films they exhibited. See Renton, 475 U.S. at 46-47; Young, 427 U.S. at 70, 71. The Court further elaborated that an otherwise content-neutral time, place, and manner restriction does not become a content-based restriction because the legislature's purpose was based on the subject matter of the regulated material. See Renton, 475 U.S. at 48-49. Finally, the Court implied that its secondary effects theory would not justify a regulation that effectively banned adult theaters from the city. See Renton, 475 U.S. at 54; Young, 427 U.S. at 70-71; see also Reno, 117 S. Ct. at 2342 (stressing that Renton does not justify a

blanket prohibition of sexually explicit expression).

Based on a reading of these cases, the district court incorrectly applied the secondary effects theory in Free Speech Coalition. The changes to the child pornography statute are not an otherwise content-neutral time, place, and manner restriction because they effectuate a blanket prohibition on sexually explicit, computer generated images that appear to be of a child. See 18 U.S.C.A. 2256(a)(8) (West Supp. 1998). Because this new amendment is not a time, place, and manner regulation and because it is clearly content based, the Court's secondary effects theory will not justify the use of less than strict scrutiny review. See, e.g., Reno, 117 S. Ct. at 2342 (stressing that protecting children from the effects of sexual material on the internet is not a secondary effect under Renton's reasoning).

n81. See Sable Communications v. FCC, 492 U.S. 115, 126 (1989) (holding that restrictions on sexual expression are subject to strict judicial review).

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In Miller, the Supreme Court declared that all sexually explicit but not obscene material retained First Amendment protection. n82 [*1346] The Stanley decision, which preceded the Miller case, held that even obscene material retained limited First Amendment protection when merely possessed within the privacy of one's home. n83 When faced with the issue of nonobscene child pornography, however, the Supreme Court has carved out an exception to these widely accepted [*1347] principles of First Amendment law. n84 Although the Court has held child pornography to be without First Amendment protection, even if merely possessed, the Court's reasoning has been based on eradicating the despicable means that were once necessary to produce these visual images - the underlying sexual abuse of children. n85

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n82. See Miller, 413 U.S. at 27. Since Miller, a few commentators have argued that sexually explicit material constitutes low value speech and therefore, only deserves limited First Amendment protections. See Geoffrey R. Stone, Comment, Anti-Pornography Legislation as Viewpoint-Discrimination, 9 Harv. J.L. & Pub. Pol'y 461, 477-78 (1986) (arguing that pornography constitutes a new category of low-value speech because of its harmful, unconscious effects on viewers and its noncognitive similarity to obscene expression); Cass R. Sunstein, Pornography and the First Amendment, 1986 Duke L.J. 589, 606-07 (contending that nonobscene pornographic materials should be provided limited First Amendment protection because it operates in a noncognitive manner). On the other hand, many analysts have criticized this low-value approach to sexual expression and have argued that the Court's definition of obscenity draws the line between unprotected and fully protected speech. See Branit, supra note 80, at 440-43 (claiming that pornography is not a form of unprotected expression because it is not obscene and does not satisfy the stringent Brandenburg test for dangerous and harmful speech); Mary C. Dunlap, Sexual Speech and the State: Putting Pornography in its Place, 17 Golden Gate U. L. Rev. 359, 362, 374-75 (1987) (explaining that the Court's reasoning for allowing restrictions on obscenity cannot be extended to deny all sexually explicit material full constitutional protections); Jeffrey M. Shaman, The Theory of Low-Value Speech, 48 SMU L. Rev. 297, 327-28 (1995) (questioning the constitutional validity of a low-value approach to providing protected expression with less than full First Amendment protection). The

Supreme Court has never specifically addressed the issue of providing sexually explicit material with a lesser degree of First Amendment protection. Although the Court has sanctioned the use of differing degrees of protection for different forms of speech, such as commercial speech and nonverbal speech, the Court has never explicitly stated that sexual expression deserves less than full First Amendment protection. See Sable, 492 U.S. at 126 (stating that nonobscene sexual expression is "protected by the First Amendment").

In Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546, 547-48 (1975), town officials prohibited the plaintiff from performing the musical Hair at a local municipal theater because it contained nudity and sexually explicit scenes. See Conrad, 420 U.S. at 547-48. Despite the musical's sexually provocative themes, the Court applied a strict scrutiny test and found the prior restraint to be a violation of the First Amendment. See id. at 557-58. Similarly, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 206-07 (1975), a town passed an ordinance prohibiting drive-in movie theaters from displaying films that contained nude scenes. See id. at 206-07. In striking down the ordinance as violative of the First Amendment, the Court held that the government could not restrict sexually explicit speech just because it may be offensive to some members of the public. See id. at 210-11. Finally, in Sable Communications v. FCC, 492 U.S. 115, 117 (1989), the Court struck down a federal regulation that prohibited the transmission of indecent commercial telephone messages to adults. See id. After declaring that sexual expression is protected by the First Amendment, the Court invalidated the restriction because it was not the least restrictive means of achieving the government's compelling interest in protecting children. See id. at 131. But see Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570-71 (1991) (holding that nude dancing could be prohibited in lounges and adult stores, not because of the value of the expressive activity but because of its secondary effects); Renton v. Playtime Theaters, Inc., 475 U.S. 41, 46-47 (1986) (holding that a restriction on the location of adult movie theaters was a content-neutral regulation, and therefore subject to a more deferential standard of review because the regulation focused on eradicating the secondary effects caused by such theaters); Young v. American Movie Theaters, Inc., 427 U.S. 50, 62 (1976) (using a more deferential level of scrutiny to uphold an ordinance restricting the location of adult theaters and bookstores). In these few cases where the Court has upheld restrictions on sexually explicit expression, the Court did state that sexual expression is a highly valued form of expression. See Shaman, supra, at 309 (explaining that a majority of the Court has never held sexual expression to be of low First Amendment value).

n83. See Stanley v. Georgia, 394 U.S. 557, 559 (1969).

n84. See Osborne v. Ohio, 495 U.S. 103, 108 (1990).

n85. See id. at 109-10. As Judge Beezer of the United States Court of Appeals for the Ninth Circuit eloquently put it:

A child pornography law is akin to a child labor law: both are concerned with the conduct through which a product is made, not with what the product is or the product's effect on consumers. Accordingly, "Ferber seems to signal a heightened sensitivity on the Court's part to the harms that pornographic activity can inflict upon participants."

United States v. United States Dist. Court for the Central Dist. of Cal., 858 F.2d 534, 545 (9th Cir. 1988) (Beezer, J., dissenting) (citation omitted) (quoting Laurence Tribe, American Constitutional Law 12-16, at 914-15 (2d ed. 1988)); see also Jeffrey J. Kent & Scott D. Truesdell, Spare the Child: The Constitutionality of Criminalizing Possession of Child Pornography, 68 Or. L. Rev. 363, 387 (1989) (explaining that child pornography may be restricted or prohibited because it is "part of a continuing course of illegal conduct and not..."speech' in the usual sense").

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The Supreme Court has departed from constitutional principles in order to permit the government to prohibit even the mere possession of child pornography. Even so, Congress may only regulate and prohibit nonobscene child pornography to dry up its production. n86 It is the injuries that children incur when they are used to produce these visual images and the harms stemming from the future distribution of such visual depictions that have driven the Court to stray from deeply rooted principles of First Amendment law. n87

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n86. See Osborne, 495 U.S. at 109-10.

n87. For instance, in United States v. Smith, 795 F.2d 841, 844-45 (9th Cir. 1986), the defendant was charged with violating 18 U.S.C. 2252 for mailing undeveloped and unprocessed photographic film that was taken of semi-nude minors. See id. The defendant argued that the term visual depiction did not include undeveloped film because no visual image had yet been created. See id. at 846. The court rejected this argument, explaining that it was not the state of the development of the film that was important, but rather the child's participation underlying the creation of the undeveloped material. See id. at 846-47.

Smith illustrates that Congress' primary and sole objective in prohibiting child pornography is to protect the children who are victimized when the material is created and not to regulate the image itself. With computer-generated child pornography, there is no underlying harmful or illegal conduct for Congress to regulate or prohibit.

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These harms are not present when a sexually explicit image depicting an imaginary child is created solely by computer technology without the use of an actual child participant. n88 When the computer- [*1348] generated images are created and distributed, no actual child has been subjected to any form of sexual abuse and no actual child's privacy interests have been exploited or invaded. n89 Therefore, Congress cannot defend such an intrusion on First Amendment rights on the basis of protecting children because no actual child has been used or abused to produce these computer images.

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n88. See supra note 10 and accompanying text for a discussion of the computer-generation process.

n89. See supra notes 69-74 and accompanying text. It would be a different story if the image creator used an actual child to model while the image was created by computer. This is because an actual child has been used to create the image. Even a sexually explicit artistic drawing or sculpture, if created while using a child model, would involve some level of participation by an actual child and would constitute some form of sexual abuse. In addition, that child model's identity has been reproduced either on the canvas or computer screen and if distributed or exploited, would be an infringement of that child's privacy rights.

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In addition, the Ferber Court stated that sexually explicit images of children that are not the result of a child's live performance retain First Amendment protection. n90 The Court reaffirmed this reasoning in United States v. X-Citement Video, Inc., n91 when it held that a defendant could not be constitutionally convicted under a child pornography statute unless he knew that the material contained depictions of children under the age of majority. n92 In reaching its conclusion, the Court explained that "the age of the performers is the crucial element separating legal innocence from wrongful conduct." n93 Under the Court's holding, if the subject of the visual image is over the age of majority or the possessor reasonably believed so, the individual possessing the material could not be prosecuted under the child pornography statutes. n94 Although the Court did not consider the issue of computer-generated subjects, the Court's language strongly [*1349] implies that an individual may only be prosecuted for possessing material that depicts an actual person under the age of majority. n95

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n90. See New York v. Ferber, 458 U.S. 747, 764-65 (1982).

n91. 513 U.S. 64 (1994).

n92. See X-Citement Video, 513 U.S. at 78. In X-Citement Video, the defendant, an adult video retailer and distributor, was convicted for distributing a pornographic film depicting the live performance of a minor. See id. at 66. In his defense, the defendant argued that the federal child pornography statutory scheme was unconstitutional because it did not specifically require the government to prove that the defendant knew that the material contained depictions of children. See id. at 66-67. Although the Court did not invalidate the statute, Chief Justice Rehnquist held that the provision was not constitutional unless it contained a scienter requirement with respect to the age of the participants in the sexually explicit material. See id. at 78.

n93. Id. at 73. Congress' recent prohibition on computer-generated materials is difficult to reconcile with the Court's holding in X-Citement Video because the new amendment prohibits material with no actual human performer whose age can be reasonably determined or inferred by the trier of fact. See Burke, supra note 9, at 452-54 (articulating the inherent problems in construing the new amendment in accordance with the Court's decision in X-Citement Video).

n94. See X-Citement Video, 513 U.S. at 72-73.

n95. See id.

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Over the past decade, a few state courts have considered whether computer-generated child pornography can be constitutionally regulated. In Cinema I Video, Inc. v. Thornburg, n96 the North Carolina Court of Appeals considered whether the child pornography law could be construed to prohibit visual depictions that were produced without the use of a live minor. n97 Based on the language in Ferber, the North Carolina court found the child pornography law unconstitutional unless it required the exploitation of an actual, live minor as an element of the offense. n98

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n96. 351 S.E.2d 305 (N.C. Ct. App. 1986).

n97. See Cinema I Video, 351 S.E.2d at 318-19. The plaintiffs, comprised of a group of videotape sellers and viewers, sought a judgment declaring North Carolina's child pornography statute unconstitutional as drafted. See id. at 309, 319. The challenged statute prohibited "material that contains a visual representation of a minor engaged in sexual activity." N.C. Gen. Stat. 14-190.17(a)(2) (1993). A preceding section, however, defined "material" as "pictures, drawings, video recordings, films or other visual depictions or representations ...." N.C. Gen. Stat. 14-190.13(2) (1993). The plaintiffs argued that these provisions could be authoritatively construed to encompass materials produced without the use of an actual child. See Cinema I Video, 351 S.E.2d at 319.

n98. See Cinema I Video, 351 S.E.2d at 319.

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Similarly, in Aman v. State, n99 the Georgia Supreme Court was called upon to construe the breadth and scope of Georgia's child pornography statute that proscribed visual material that "depicts a minor." n100 The Aman court held that the term "depict a minor" must be limited to visual representations of a live minor in order for the Georgia statute to survive constitutional scrutiny. n101 The Georgia court explained that the state's objective in protecting children from the harms of child pornography was only served by banning child pornography that was "based on the use of a live child model." n102

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n99. 409 S.E.2d 645 (Ga. 1991).

n100. See Aman, 409 S.E.2d at 646. In Aman, Georgia convicted the defendant for possessing articles of child pornography. See id. The statute made it "unlawful for any person knowingly to possess or control any material which depicts a minor engaged in any sexually explicit conduct." Ga. Code Ann. 16-12-100(b)(8) (1996).

n101. See Aman, 409 S.E.2d at 646.

n102. Id. at 647 (Hunt, J., concurring). Relying on Osborne, the Georgia Supreme Court found no legitimate basis for legislation that criminalized sexually explicit material that did not involve the use of an actual child. See id. at 646, 647 (Hunt, J., concurring). The court's language implied that protecting children from sexual exploitation was the only permissible governmental purpose justifying a ban of child pornography. See id.

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[*1350] Finally, in State v. Stoneman, n103 the Oregon Supreme Court considered the appropriate interpretation of Oregon's child pornography statute. n104 Oregon law prohibits the sale of any "visual recording of sexually explicit conduct involving a child." n105 Relying on Oregon's constitution, the Stoneman court held that the material made criminal by the statute must be limited to visual reproductions of live events. n106 The Oregon court stated that materials merely giving "the illusion that actual children are involved" could not be prohibited by the statute. n107

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n103. 920 P.2d 535 (Or. 1996).

n104. See Stoneman, 920 P.2d at 537. In Stoneman, the defendant was arrested for purchasing certain materials that contained depictions of child pornography. See id.

n105. Or. Rev. Stat. 163.686(1)(a)(A)(ii) (1997).

n106. See Stoneman, 920 P.2d at 537-38 & n.3. The court relied on a provision of Oregon's constitution, similar to the First Amendment, which states that "no law shall be passed restraining the free expression of opinion, restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." Id. at 537 n.2; Or. Const. art. I, 8.

n107. Stoneman, 920 P.2d at 538.

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Although the previously discussed statutes did not specifically exempt from criminal punishment materials produced without the use of an actual child, courts in these states have limited their application to exempt such material in order to survive constitutional review. n108 Several commentators have argued that decisions exempting such material are a result of statutory interpretation rather than any constitutional principle. n109 Rather, such an interpretation is required [*1351] by the Supreme Court's decisions in both Ferber and Osborne, which explain that any broader reading of these statutes would prohibit protected material and render the statutes unconstitutional under the First Amendment. n110

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n108. Several other state child pornography statutes do not explicitly state whether they are limited to cover only visual reproductions of live events involving actual children. See Ariz. Rev. Stat. Ann. 13-3551(5)(b) (West Supp.

1997) (defining visual medium as any "computer-generated image of a minor"); Cal. Penal Code 311.3(a) (West Supp. 1998) (prohibiting computer-generated images that depict a person under the age of 18); Ill. Comp. Stat. Ann. 5/11-20.1(a)(6) (West 1993) (defining child pornography as a visual reproduction of a child under age 18); Mich. Comp. Laws Ann. 750.145c(i) (West 1991) (defining child pornography as any electronic visual image of a child engaging in a sexual act); N.J. Stat. Ann. 2C:24-4(4) (West 1995) (prohibiting the reproduction or reconstruction of an "image of a child in a prohibited sexual act"); Or. Rev. Stat. 163.688(1)(a) (1997) (prohibiting the possession of "any visual depiction of sexually explicit conduct that appears to involve a child"); Pa. Cons. Stat. Ann. 6312(d) (West Supp. 1997) (prohibiting computer depictions of a child under age 18). These statutes do not explicitly state whether they prohibit computer-generated child pornography produced without the involvement of an actual minor. However, relying on the reasoning in the previously mentioned cases, for these statutes to avoid being invalidated as unconstitutional, they must be interpreted to cover only visual reproductions of actual, live children.

n109. See Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Committee on the Judiciary, 104th Cong. 41, 45 & n.2 (1996) (statement of Professor Frederick Schauer, Harvard Law School) (stressing the point that sexually explicit material created without the use of an actual minor cannot be prohibited as a matter of federal constitutional law and not merely due to statutory interpretation).

n110. See id.

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Some states, on the other hand, have drafted their statutes explicitly to exclude material that is not a reproduction of a live event. n111 These statutes would clearly survive constitutional scrutiny, because the states have limited their attack solely to prevent the harms associated with children being used to create child pornography. n112 Statutes that are not expressly limited to cover child pornography depicting live performances may still be constitutionally valid provided they are not interpreted to prohibit nonobscene images produced without the use of an actual child. n113 If not, such statutes run the risk of being declared inconsistent with the First Amendment as set out in Ferber, Miller, and Stanley.

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n111. See Ala. Code 13A-12-190(12) (1994) (defining child pornography as any "visual reproduction of a live act, performance or event"); Alaska Stat. 11.61.127(a) (Michie 1996) (prohibiting the possession of material that "involved the use of a child under eighteen"); Conn. Gen. Stat. Ann. 53a-193(13) (West 1994) (defining child pornography as "any material involving the live performance" of a child); Fla. Stat. Ann. 827.071(4) (West 1994) (prohibiting the possession of material that "includes any sexual conduct by a child"); Iowa Code Ann. 728.12(2) (West 1993) (prohibiting visual depictions of a "live performance of a minor engaging in a prohibited sexual act"); Kan. Stat. Ann. 21-3516(2) (1995) (prohibiting visual material in which a "real child" is shown); Ky. Rev. Stat. Ann. 531.335(1) (Banks-Baldwin Supp. 1996) (prohibiting visual depictions of "an actual sexual performance by a minor person"); Mo. Ann. Stat. 573.010(1) (West 1995) (excluding from the definition of child

pornography "material which is not the visual reproduction of a live event"); Neb. Rev. Stat. 28-1463.02(6) (1995) (defining visual depiction as a representation of a "live performance"); N.M. Stat. Ann. 30-6A-3(C) (Michie 1994) (outlawing the creation of a visual image that depicts a child participant); Ohio Rev. Code Ann. 2907.322(5) (Anderson 1996) (banning the possession of "any material that shows a minor participating or engaging in sexual activity"); Okla. Stat. Ann. tit. 21, 1021.2 (West Supp. 1998) (prohibiting "material involving the participation of any minor"); Va. Code Ann. 18.2-374.1(B)(3) (Michie 1996) (prohibiting sexually explicit computer-generated material "which utilizes or has as a subject" a minor).

n112. See Osborne v. Ohio, 495 U.S. 103, 109 (1990).

n113. See New York v. Ferber, 458 U.S. 747, 764 (1982) ("The conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed.").

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Although no federal court specifically has limited the scope of the federal child pornography laws to include only depictions of live events, a few courts of appeals have been faced with the issues presented by computer-generated child pornography. In United States v. [*1352] Nolan, n114 the defendant was convicted for the knowing receipt of child pornography in violation of 18 U.S.C. 2252(a)(2). n115 On appeal, the defendant argued that the prosecution failed to prove that the photographs were taken of an actual child. n116 Specifically, Nolan argued that the prosecution, in order to convict him, had to prove that the photographs were taken of actual children and not wax figures, mannequins, or composite representations that were faked or doctored or even created by computer generation. n117 Although the United States Court of Appeals for the First Circuit refused to place such a burden on the prosecution, the court gave some credence to the defendant's claims. n118 In so doing, the court stated that in order for the defendant to be convicted under 2252 the jury had to be convinced that the images in question were made using actual children. n119

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n114. 818 F.2d 1015 (1st Cir. 1987).

n115. See Nolan, 818 F.2d at 1016. Nolan was convicted for receiving child pornography that was sent from a source located in a foreign country. See id. Although 18 U.S.C. 2252 did not explicitly prohibit child pornography produced in foreign countries, the United States Court of Appeals for the First Circuit held that Congress did not intend to only "protect United States children from the negative effects this activity has on them." Id. at 1016 n.1.

n116. See id. at 1016.

n117. See id.

n118. See id. at 1018-19. The court refused to hold the prosecution to the duty of "ruling out every conceivable way the pictures could have been made other than by ordinary photography." Id. at 1020. The court further explained that the jury, by merely viewing and analyzing the images without the use of expert testimony, could infer that the "subjects depicted actually existed"

and "were of actual, living children who were, therefore, "used' in the production of these pictures." Id. at 1018.

n119. See id. at 1018, 1020. Even though the prosecution was not required to bring in an expert to prove that the visual depictions were of actual children, the Nolan court stated:

Whether it would be practicable to manufacture pornography [by computer generation] is, therefore, purely speculative, and we do not think the government was required to negative in advance what is merely unsupported speculation. Appellant, of course, was free to have presented evidence of his own suggesting that the pictures used other than real subjects. He could have called an expert to testify as to how photographs like these could have been made without using real children.

Id. at 1020.

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This case explains that the government may only prohibit child pornography that is created with the use of an actual child. n120 Nolan furthers the proposition that Congress can only constitutionally prohibit nonobscene child pornography in order to protect children. [*1353] Although the Nolan court held that the government did not have the burden of proving that the material depicted an actual child, it implied that computer generation, without the use of a child, was an available defense. n121

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n120. See Nolan, 818 F.2d at 1020.

n121. See id.

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This defense was also recognized in United States v. Kimbrough. n122 The defendant offered evidence that the images in question could have been created by photograph-altering computer software. n123 In response, the United States Court of Appeals for the Fifth Circuit stated, "Had the jury believed Kimbrough's defense - that the depictions had been altered and were not of actual children - they could have easily found so applying the instructions as given." n124 The only inference to draw from this statement is that child pornography created solely by computer generation cannot be the basis for criminal punishment under any child pornography statute.

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n122. 69 F.3d 723 (5th Cir. 1995). In Kimbrough, the defendant was convicted for receiving several depictions of child pornography by means of his computer, a violation of 18 U.S.C. 2252A. See id. at 726-27. After being sentenced to 72 months in prison, the defendant argued that the jury instructions given by the trial court constituted reversible error. See id. at 727, 733. Specifically, "Kimbrough argued that the Court should have instructed the jury that "it must

find Defendant knew the producing of the depiction involved the actual use of a minor engaging in sexually explicit conduct.'" Id. at 733.

n123. See S. Rep. No. 104-358, at 17 (1996). Kimbrough had hoped that the court would require the prosecution to prove that the images were made using actual children. See id.

n124. Kimbrough, 69 F.3d at 733.

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By placing the burden of proof upon the defendant to prove that the child pornography in question was made without the use of an actual child, one of Congress's reasons for prohibiting computer-generated child pornography is rendered meaningless. In his report to Congress, Senator Hatch argued that the failure to prohibit computer-generated child pornography would pose undue burdens on the government's ability to prosecute offenders because it would be required to prove that images of child pornography were produced with the use of actual children. n125 Based on the rapid advancement of computer technology, within a few years the computer-generated [*1354] images will be almost indistinguishable from photographs of live, actual persons. n126

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n125. See S. Rep No. 104-358, at 16-17 (1996). The report stated: "If the government must continue to prove beyond a reasonable doubt that mailed photographs...and computer images...are indeed actual depictions of an actual minor engaging in the sex portrayed then there could be a built-in reasonable doubt argument in every child exploitation/pornography prosecution." Id. (footnote omitted).

n126. See Weigner & Schlax, supra note 10, at 274.

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Under the reasoning in Nolan and Kimbrough, however, it is the defendant's burden to prove that the child pornography was produced without using an actual child. n127 The prosecution bears no burden of proving that an actual child was exploited. If the technology is capable of producing images that appear life like to an average juror, the defendant, not the government, will be forced to bring in an expert to try and prove how the material was actually made. n128 Therefore, it is the defendant, and not the prosecution, who will face the difficulty in proving that the image was computer-generated rather than photography of an actual child. n129 As a result, the congressional purpose of protecting children has become intertwined with the public's desire to censor nonobscene child pornography. This censorship does not alone give rise to a compelling government interest justifying an intrusion on First Amendment rights. n130

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n127. See United States v. Kimbrough, 69 F.3d 723, 733 (5th Cir. 1995); United States v. Nolan, 818 F.2d 1015, 1020 (1st Cir. 1987).

n128. See Nolan, 818 F.2d at 1017-18. In Nolan, the court explained that ordinary people were sufficiently capable of distinguishing photographs of actual people from "other forms of visual reproductions." Id. As a result, the court held that the prosecution did not have to produce expert testimony in order to prove that the visual images in question depicted an actual child. See id. at 1018-19. The fact-finder is permitted to determine, just by viewing the material, whether they were produced by photograph or by computer-generation. See id. at 1017-18.

n129. See id. at 1020.

n130. Even as technology advances, allowing images to be created that are virtually indistinguishable from actual photographs, courts would most likely require the defendant to bear the burden of showing that the material in issue was created without the use of an actual child or his photographed image. Cf. id. at 1017-18. Because the restriction is content-based, the government, in order to survive strict scrutiny, must show that the means chosen in the statute are the least restrictive means available. See supra notes 80-81 and accompanying text.

Creating a rebuttable presumption that images depict actual persons provides a less restrictive alternative to a blanket prohibition of computer generated images. For instance, Congress could require defendants to provide sufficient evidence that images were computer-generated and absent such a showing the jury could infer that the child pornography was created using an actual, identifiable minor. A few states have already taken this approach by promulgating statutes that permit the trier of fact to infer that a person in the visual image is a minor if the material represents or depicts the participant as a minor. See, e.g., Ohio Rev. Code Ann. 2907.322(B)(3) (Anderson 1996); S.C. Code Ann. 16-15-405(B) (Law. Co-op. Supp. 1997); Tenn. Code Ann. 39-17-1003(b) (1997). This permissive inference, justified by the Supreme Court in County Court of Ulster County v. Allen, 442 U.S. 140, 157 (1979), would adequately address the government's concerns without infringing on First Amendment rights. See Allen, 442 U.S. at 157 (holding that permissive inferences do not abdicate the defendant's right to have every element of the offense proven by the prosecution unless there is no rational way the jury could "make the connection permitted by the inference").

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Congress's Justifications for the New Amendment

In order to determine the constitutional validity of the Hatch Amendment, the Court would have to consider whether any of Congress's purposes and motives underlying the legislation constitute a compelling government interest. n131 Preventing the harms caused by a child's participation in the production of child pornography is only one of the declared purposes behind the federal child pornography statutes. n132 As previously discussed, Congress's new definition of child pornography is not directed at protecting children from being used to create child pornography. n133

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n131. See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 414 (1996) (arguing that the Court's First Amendment principles are intended to uncover improper legislative motives and purposes behind legislation).

n132. See S. Rep. No. 104-358, at 2 (1996) (stating that the existence of computer-generated child pornography "creates the potential for many types of harm in the community and presents a clear and present danger to all children").

n133. See supra notes 80-83 and accompanying text.

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Congress, however, has sought to prohibit computer-generated child pornography because the government believes (1) it might provide sexual stimulation for pedophiles and (2) is indirectly dangerous to children and harmful to the moral fabric of our society. n134 Although this rationale may be socially acceptable, this reasoning directly conflicts with the underlying values of the First Amendment. Under the First Amendment, Congress has no authority to ban visual images simply because they are repugnant to a majority of society or because they may have an adverse effect on the minds of viewers. n135 [*1356] As the United States Court of Appeals for the Ninth Circuit has pointed out, "Speech shielded by the [First] Amendment's protective wing must remain inviolate regardless of its inherent worth. The distaste we may feel as individuals toward the content or message of protected expression cannot, of course, detain us from discharging our duty as guardians of the Constitution." n136 Indeed, just because child pornography may be socially abhorrent, the First Amendment still guarantees free expression, unless some countervailing governmental interest outweighs this fundamental right. n137

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n134. See S. Rep. No. 104-358, at 17 (1996). In his report to Congress, Senator Hatch explained:

As discussed above, a major part of the threat to children posed by child pornography is its effect on the viewers of such material, including child molesters and pedophiles who use such material to stimulate or whet their own sexual appetites. To such sexual predators, the effect is the same whether the child pornography consists of photographic depictions of actual children or visual depictions produced wholly or in part by computer. To such a viewer of child pornographic images the difference is "irrelevant because they are perceived as minors by the psyche."

Id.

n135. See Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); see also Martin H. Redish, First Amendment Theory

and the Demise of the Commercial Speech Distinction: The Case of the Smoking Controversy, 24 N. Ky. L. Rev. 553, 562 (1997) ("However, it amounts to a nonsequitur to reason that because particular speech causes serious harm, the speech is to be judged by a less protective standard."); Kathleen M. Sullivan, Cheap Spirits, Cigarettes and Free Speech: The Implications of 44 Liquormart, 1996 Sup. Ct. Rev. 123, 127 ("Regulations aimed at viewpoints, subject matters, or the communicative impact of speech on its audience get strict scrutiny, even if the ideas aimed at are not very good or valuable ideas ....").

n136. United States v. United States Dist. Court for the Central Dist. of Cal., 858 F.2d 534, 541 (9th Cir. 1988).

n137. See Cohen v. California, 403 U.S. 15, 21 (1971) ("The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.").

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In addition, even if computer-generated child pornography may have socially adverse effects on its viewers' minds, n138 under the First Amendment this is an area that Congress is not entitled to regulate. n139 This reasoning is the centerpiece of the Court's holding in Stanley. n140 In Stanley, Georgia argued that it could pass regulations that protected its citizens' minds from the adverse effects of viewing obscene materials. n141 Rejecting this contention, Justice Marshall explained that the First Amendment guaranteed to citizens the fundamental "right to receive information and ideas, regardless of their [*1357] social worth" and "to satisfy [their] intellectual and emotional needs in the privacy of [their] own homes." n142

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n138. See Clinton, supra note 7, at 132 (claiming that pedophiles use child pornography to sexually stimulate themselves while masturbating); Tim Tate, The Child Pornography Industry: International Trade in Child Sexual Abuse, in Pornography: Women, Violence and Civil Liberties 211 (Catherine Itzin ed., 1992) (explaining that pedophiles use child pornography to validate their feelings, to normalize their sexual cravings, and to lower their inhibitions so that they can go out and abuse children). But see John C. Scheller, Note, PC Peep Show: Computers, Privacy, and Child Pornography, 27 J. Marshall L. Rev. 989, 996 n.47 (1994) (expressing the alternative view that using child pornography helps pedophiles and is a "healthy expression of repressed feeling and fantasy and helps people to become more comfortable with their sexuality").

n139. See Kent & Truesdell, supra note 85, at 386 n.121 (arguing that the government cannot prohibit pornography in order to train people to hold socially acceptable views).

n140. See Stanley v. Georgia, 394 U.S. 557, 563-65 (1969).

n141. See id. at 565.

n142. Id. at 564, 565; see also Gordon Hawkins & Franklin E. Zimring, Pornography in a Free Society 178 (1988) (emphasizing that pedophiles may not

be the only members of society who use child pornography to become sexually aroused).

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The Supreme Court adhered to this reasoning again in Osborne when it permitted the states to proscribe the possession of child pornography as long as the purpose of the restriction was not to regulate people's minds. n143 Prohibiting computer-generated child pornography in order to control people's sexual feelings and thoughts would contravene the purposes and philosophy behind the First Amendment. n144 Even if viewers use child pornography for sexual stimulation, this activity alone does not establish a compelling government interest in prohibiting the material. In United States v. Wiegand, n145 the Ninth Circuit stated: "The crime punished by the statutes against the sexual exploitation of children, however, does not consist in the cravings of the person posing the child or in the cravings of his audience. Private fantasies are not within the statute's ambit." n146 Therefore, Congress cannot defend its unconstitutional broadening of the coverage of the federal child pornography statute based on its attempts to control the "sexual appetites" of pedophiles and other viewers. n147

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n143. See Osborne v. Ohio, 495 U.S. 103, 109 (1990).

n144. See Stanley, 394 U.S. at 565 ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

n145. 812 F.2d 1239 (9th Cir. 1987).

n146. Weigand, 812 F.2d at 1245.

n147. See S. Rep. No. 104-358, at 17 (1996).

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Furthermore, Congress cannot ban the possession of computer-generated child pornography simply because the material may cause the viewer to act out his fantasies and molest or abuse a child. n148 The causal link between the proposition that those who view child pornography will ultimately abuse a child is too attenuated. n149 In Stanley, the Court rejected the state's argument that the viewing of obscene images had a tendency to cause its viewers to commit unlawful sexual acts. n150

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n148. Cf. Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) ("Fear of serious injury cannot alone justify suppression of free speech").

n149. See Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Under the Court's "clear and present danger" test, speech cannot be prohibited or punished because of its dangerous propensity unless the potential harm is intended, imminent, and likely to occur. See id.